83-2139

Office - Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's denial of petitioner's claim of qualified immunity, which can be resolved as a matter of law, is immediately appealable under the collateral order exception to 28 U.S.C. § 1291 enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly established right of public employees under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.*

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*Pursuant to Rule 21.1(b) of the Rules of this Court, the following is a complete list of the parties in the underlying proceedings (identified as plaintiffs or defendants in the district court, and as appellants or appellees in the court of appeals):

Plaintiffs/appellees	John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Francis D. Radcliff, Robert W. Robinson, Michael Shepherd, Larry Williams and Larry W. Griffin,
Defendants/appellants	John D. Rockefeller IV, Walter Gilbertson and Charles L. Miller,
Defendants	John Gum and Wilton Williams.

In addition to these parties, the United States of America appeared as amicus curiae in support of Governor Rockefeller's Petition for Rehearing in the court of appeals.

Furthermore, defendants/appellants Walter Gilbertson and Charles L. Miller are, by their separate counsel, filing a petition with this Court for a writ of certiorari with respect to their claims of immunity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John D. Rockefeller IV, Governor of the State of West Virginia, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals [App. A, *infra*, 1a-26a] is reported as *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1983). However, the order denying petitioner's request for a rehearing with suggestion for rehearing en banc [App. C, *infra*, 48a-49a] is not yet officially reported.

The district court's opinion denying petitioner's motion for summary judgment [App. B, *infra*, 27a-47a] is unpublished.

JURISDICTION

The district court's order denying petitioner's motion for summary judgment was entered on July 22, 1983 and was timely appealed to the United States Court of Appeals for the Fourth Circuit. By its opinion dated January 11, 1984, the court of appeals dismissed the appeal for lack of jurisdiction. Petitioner's motion for rehearing was thereafter denied on April 5, 1984 by an equal division of the regular active voting judges. The jurisdiction of this Court to review this case is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue of appealability involves 28 U.S.C. § 1291. Respondents' claims, against which petitioner asserts qualified immunity, are brought under 42 U.S.C. §§ 1983 and 1985 and are based upon the First, Ninth and Fourteenth Amendments. The question of employment authority in the West Virginia Department of Highways, which relates to the injunctive claims asserted against petitioner, is governed by W. VA. CODE § 17-2A-4 (1983). The texts of these constitutional and statutory provisions are reprinted in Appendix E, *infra*, 51a-53a.

STATEMENT OF THE CASE

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court sought to revitalize the important but faltering defense of qualified immunity by reformulating it into a threshold defense to be resolved on objective facts, based upon the "objective reasonableness of an official's conduct," 457 U.S. at 818. Out of this refashioned standard has developed the critical issue which is now presented for review in this case: whether the trial court's denial of a post-*Harlow*

qualified immunity defense is or should be an immediately appealable order under the collateral order exception to 28 U.S.C. § 1291.

A. Overview To Respondents' Claims.

This case is one of nine cases currently pending in the Southern and Northern Districts of West Virginia against petitioner, his Commissioner of the West Virginia Department of Highways and others. These nine cases arise out of a massive reduction-in-force implemented in the West Virginia Department of Highways during the first six months of 1981 and all involve claims by certain former employees that their individual terminations were politically-motivated and, hence, in violation of their respective constitutional rights. These cases thus attempt to assert that type of claim which has become known as an "*Elrod* claim," in recognition of the 1976 Supreme Court opinion which first enunciated a constitutional restriction on the American patronage system of government. *See Elrod v. Burns*, 427 U.S. 347 (1976), *overruling sub silentio*, *Nunnery v. Barber*, 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

This particular case involves the reduction-in-force implemented in Doddridge County in District Four of the Highways Department, in which thirteen of forty-three employee positions were eliminated. Three of the respondents were terminated from employment on February 27, 1981, during the second of three reductions-in-force that year. The remaining six respondents were terminated in the third and last reduction-in-force, on June 30, 1981. The other eight cases involve the same reductions-in-force, although in different counties and districts of the Highways Department.

Because the actions of this petitioner involve nothing more than his authorization of a fiscally-mandated reduction-in-force, petitioner has asserted that his actions do not fall within the prohibitions of *Elrod* and do not

violate any clearly established rights of respondents. Petitioner has accordingly asserted that he is entitled to qualified immunity.

B. Petitioner's Involvement In Respondents' Terminations.

In late 1980, petitioner was advised by his Highways Commissioner of an impending and serious fiscal crisis in the Department of Highways, which was a result not only of a rapidly declining economy and a consequent shortfall in revenue collections, but also of an earlier federal freeze on funds for new Highways projects. This fiscal crisis proved doubly harsh in 1981, for it was coupled with a substantially reduced legislative appropriation for fiscal year 1982 and the realization that the funding problems for the Department of Highways were likely to continue into future years. Long-term cost-cutting measures, including substantial cutbacks in the Highways workforce, were accordingly required and authorized by petitioner. In accordance with W. VA. CODE § 17-2A-4 (1983) [App. E, *infra*, 53a], the implementation of these cutbacks was thereafter left to and handled by the Highways Commissioner.

In 1981, the year of respondents' terminations, the immediate impact of these fiscal constraints was the elimination of over 1,500 employee positions. Since that time, an additional 1,100 employees have lost their jobs, so that approximately one-third of the Highways workforce that existed in late 1980 has now been eliminated.

It is against this backdrop that respondents prosecute their claims against petitioner. Significantly, respondents do not question petitioner's decision to authorize the 1981 reduction-in-force; they concede that the reduction-in-force was a matter of fiscal necessity which was essential for the maintenance of a sound State budget. All that

respondents question in this case is whether they, individually and as a matter of policy, were victims of political discrimination once the decision to reduce the Highways' workforce was implemented.

Respondents' alleged improper selection for termination is thus the essence of their claims. In this connection, the record is both clear and uncontradicted that respondents' immediate supervisor, defendant John Gum, was alone responsible for deciding which members of his workforce were to be terminated as part of the reduction-in-force. The record is equally clear that at the time Supervisor Gum was entrusted with the task of making this decision, he was thoroughly familiar with the constitutional prohibition against termination of public employees on the basis of their political affiliation.

Supervisor Gum's knowledge concerning this prohibition was no accident but was instead a function of the administration's policy against political firings. When petitioner first assumed office as Governor of West Virginia in 1977, he specifically directed that his legal staff undertake an educational process to assure that persons within his administration were aware of, and were expected to comply with, the constitutional prohibition against firing public employees on the basis of politics. Petitioner later supplemented this effort in November of 1978 when he issued an Executive Order which, among other things, prohibited discrimination in employment on the basis of politics [App. F, *infra*, at 62a]. This Executive Order was disseminated to all state agencies, including the Department of Highways.

Other than the activities described above, there is no evidence in the record of any other involvement by petitioner in the termination of the respondents. Petitioner did not know the respondents and did not know their politics. Further, there is no evidence in the record that petitioner ever suggested or indicated to any person

charged with responsibility for implementing the reduction-in-force that such reduction be accomplished because of or based on the political affiliation or beliefs of any Highways employees. Indeed, the evidence of record establishes just the contrary. Petitioner, in his affidavit [App. F, *infra*, at 54a], denied any such suggestion or approval of political firings; further, defendant Miller, petitioner's Highways Commissioner, specifically asserted in his affidavit that he was instructed not to effectuate the reduction-in-force based on political considerations [App. G, *infra*, at 66a].

C. The Denial of Petitioner's Claim of Qualified Immunity.

After extensive discovery, and based on a record which showed petitioner's only participation in respondents' terminations to be his initial authorization of the reduction-in-force itself, petitioner moved for summary judgment on the ground that his actions did not violate any clearly established rights of respondents and that petitioner was accordingly entitled to qualified immunity. As part of this motion, petitioner argued that because his actions with regard to respondents' terminations were grounded on an independent legitimate justification, *i.e.*, a fiscally-mandated reduction-in-force, it could not be said that petitioner had abridged in any way the constitutional rights of these respondents not to be terminated based solely on their politics.

On July 21, 1983, the district court denied petitioner's motion for summary judgment, finding that the constitutional rights of these respondents were in fact "clearly established" at the time of respondents' terminations [App. B, *infra*, at 45a]. The district court further concluded that petitioner's claim of good faith was inappropriate for summary judgment since respondents' *alle-*

gations were sufficient to create genuine issues of material fact precluding summary judgment [App. B, *infra*, at 46a].[1]

Petitioner thereafter appealed the district court's rejection of the qualified immunity defense and was granted an emergency stay of trial by a single judge of the court of appeals who determined that there were "no unresolved genuine and material factual disputes" with respect to the qualified immunity defense. However, on October 7, 1983, a three-judge panel of the court of appeals vacated the stay of trial and on January 11, 1984, the court of appeals, in a divided opinion, dismissed petitioner's appeal for lack of jurisdiction.

As the basis for rejecting petitioner's appeal, the court of appeals relied primarily on the fact that respondents had asserted not only damage claims but also a claim for injunctive relief against petitioner in his official capacity. The court accordingly reasoned that, because qualified immunity only protected petitioner from respondents' damage claims, the litigation against petitioner would not

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[1]Other than an affidavit of respondents' counsel which more or less reiterated the allegations of the Complaint (and which petitioner unsuccessfully sought to have stricken from the record as improper under Rule 56), respondents offered no evidence to rebut the assertions contained in petitioner's affidavit. It was based on this state of the record that the dissenting opinion below asserted: "The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations." 724 F.2d at 1092 n.5.

The district court thus ignored this Court's admonition in *Butz v. Economou*, 438 U.S. 478, 507 (1978), as reiterated in *Harlow*, 457 U.S. at 819-20 n.35, that "[i]nsubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and 'firm application of the Federal Rules of Civil Procedure' is fully warranted in such cases." Unfortunately, this is not the first time, nor certainly the last time, that a district court has denied summary judgment in the face of an insubstantial claim. *See American Family Life Assur. Co. v. Teasdale*, 564 F. Supp. 1571, 1573 (W.D. Mo. 1983). The cited case is most interesting since the district court there belatedly sought to remedy its unjustified denial of former Governor Teasdale's summary judgment and immunity claims by awarding him his attorney's fees and expenses after he prevailed at trial.

be terminated and the collateral order requirements of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), were accordingly not met. The court also found petitioner's appeal deficient under the *Cohen* requirements on the ground that no serious or unsettled question was presented since the constitutional right enunciated in *Elrod* was deemed to be clear.

The dissenting opinion, which alone attempted to review the evidence of record, took strenuous issue with the majority's jurisdictional analysis. Clearly troubled by a jurisdictional holding which ignored the distinctions between personal liability for damages and official liability in an injunctive action, the dissent also noted the possibility that artful pleaders could frustrate the quest for immunity simply by tacking on a claim for injunctive relief. More important, the dissent found "highly questionable" the applicability of *Elrod* to the case now before the Court in which the terminations were part of a reduction-in-force and in which the allegations against petitioner were "not supported by a single shred of evidence." 724 F.2d at 1092 n.5.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review by this Court to resolve conflicting rulings among the lower courts that now threaten to undermine the defense of qualified immunity which this Court took such great pains to revitalize in *Harlow*.

The pivotal question presented here is whether a qualified immunity defense, which presents only a question of law, can maintain any measure of vitality as an "immunity" if insulated from pretrial appellate review. In this case, despite at least one judge's recognition of the insubstantiality of the claim against this petitioner, and contrary to decisions of both this Court and other courts of appeals, this petitioner is now faced with trial as a result of the court of appeals' decision to dismiss as a nonappealable interlocutory order the petitioner's appeal from the denial of his immunity claim.

Two equally compelling questions are also presented with regard to the manner in which the objective standard of *Harlow* is to be applied. Of greatest concern is whether the *Harlow* standard still incorporates the concept of a qualified immunity which varies in scope, the variation being dependent upon the responsibilities of the office and the scope of discretion. Secondly, this case brings to the fore the question reserved in *Harlow* of "the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.' " 457 U.S. at 818-19 n.32 (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)). With an immunity standard which now rests entirely upon a determination of whether a public official's actions have implicated "clearly established rights," the decisions of the lower courts in this and in other cases have demonstrated a marked need for clarification concerning that law which renders a constitutional right "clearly established."

I. The Denial Of Petitioner's Qualified Immunity Claim Was A Final, Collateral Order, Appealable Under *Cohen v. Beneficial Industrial Loan Corp.*

At the time the Fourth Circuit Court of Appeals determined that it lacked jurisdiction to consider petitioner's appeal from the order denying his qualified immunity claim, two courts of appeals had already recognized the jurisdictional imperative for pretrial review of just such a qualified immunity claim: the D.C. Circuit in *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982), and the Eighth Circuit in *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983).

This jurisdictional imperative is of course rooted in this Court's decision of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which this Court openly acknowledged that the qualified immunity standard enunciated in its previous decisions was incompatible with the speedy and inexpensive resolution of "insubstantial claims" against public officials. The Court accordingly agreed that "public policy

at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial." 457 U.S. at 813.

The decision in *Harlow* was significantly rendered in a case in which the supporting evidence against the public officials remained "inferential," even at the conclusion of extensive discovery over numerous years. From a policy standpoint, this Court was clearly troubled that the time and monies of public officials, particularly those in high positions, could be expended to such an extent in the face of so little evidence. Despite its admonition in *Butz v. Economou*, 438 U.S. 478, 507 (1978), that insubstantial suits against public officials should not be allowed to proceed to trial, the Court recognized in *Harlow* that this admonition alone had not achieved its desired effect. 457 U.S. at 815-16. And so, for policy reasons, the Court attempted to breathe new life into the important but faltering defense of qualified immunity.

The Court accordingly sought to objectify the standard for qualified immunity by eliminating the previous requirement of "subjective good faith" and reformulating the standard into a legal one to be resolved based upon objective facts. 457 U.S. at 817-18. The applicability of qualified immunity, much like that of absolute immunity, thus became a question of law appropriate for disposition prior to trial. In addition, as a question of law, this Court made clear that disposition of the issue should precede not only trial, but discovery as well. 457 U.S. at 818.

What this Court apparently did not make sufficiently clear, if the split of authority among the various courts of appeals is any evidence, is whether a trial court's denial of qualified immunity was intended to end the immunity inquiry until after the full panoply of social costs occasioned by constitutional tort litigation against public officials had been incurred. As identified in *Harlow*, 457 U.S. at 814, these social costs include expenses of liti-

gation, diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office, and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the unflinching discharge of their duties'."

The issue posed is a jurisdictional one, which necessarily involves construction of the "final decision" requirement of 28 U.S.C. § 1291. At stake, of course, is the delicate balance to be struck between a desire to avoid "piecemeal" appellate review and the need to retain a qualified immunity defense which is meaningful not only in theory but in practice as well.

At present, those courts of appeals which have considered this issue have diverged sharply as to just how this balance should be struck. In *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982), the Court of Appeals for the District of Columbia struck the balance in favor of appealability by simply holding that a denial of a qualified immunity claim is immediately appealable. In *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983), the Eighth Circuit also favored the immediate appealability of such a claim, but only where the essential facts relating to the immunity claim are not in dispute and the determination of immunity is solely a question of law.

The Third and Fourth Circuits have rejected the *McSurely* and *Evans* rationales, however, and have struck the balance against appealability, albeit for different reasons. In *Forsyth v. Kleindienst*, 729 F.2d 267 (3d Cir. 1984), the Third Circuit refused jurisdiction of an appeal from an order denying qualified immunity to former Attorney General Mitchell because it believed the underlying claim against Mitchell was not an "insubstantial" one and because allowance of the appeal would " 'open the sluices to a flood of interlocutory appeals'." 729 F.2d at 274 (quoting *Forsyth v. Kleindienst*, 700 F.2d 104, 110 (3d Cir. 1983)). In this case, despite the dissent's view that the respondents' claim against petitioner is indeed insubstantial and "not

supported by a single shred of evidence," 724 F.2d at 1092 n.5, and despite the fact that the immunity issue can be resolved as a matter of law only, the Fourth Circuit nonetheless rejected jurisdiction of petitioner's appeal because of the pendency of injunctive relief claims against him and because, in the Fourth Circuit's view, the appeal did not raise a serious and unsettled question. In delivering this holding, the Fourth Circuit expressed serious doubt that any denial of a qualified immunity claim is immediately appealable. 724 F.2d at 1086.

The significance of this disparity among the circuits on this important jurisdictional issue cannot be ignored. In at least two circuits, a claim of qualified immunity is now viewed and treated as an immunity from *trial* on personal liability claims. In the Third and Fourth Circuits, however, a qualified immunity claim is substantially less and is, in substance, an immunity from *ultimate liability* only, which can only be tested in an appellate sense once liability is fixed and determined.

From a jurisdictional standpoint, the positions adopted by the Third and Fourth Circuits are simply unwarranted. Since the objectification of the standard for qualified immunity in *Harlow*, and given the critical policies and constitutional purposes served by the qualified immunity defense, all of the elements necessary to satisfy the requirements of the collateral order doctrine, as enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny, are met.[2] *See McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982).

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[2]As summarized in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978), application of the collateral order doctrine turns on the existence of the following elements: (1) the order appealed from must conclusively determine the disputed question; (2) the order must resolve an important issue completely separate from the merits of the action; and (3) the issue must be effectively unreviewable on appeal from a final judgment. An additional requirement noted in *Cohen*, that the appeal present "a serious and unsettled question," was recognized by the Supreme Court in *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982).

It is significant in the present case that the Fourth Circuit apparently conceded two of the essential elements of the collateral order doctrine: first, that the district court's order conclusively determined the question of petitioner's claim of qualified immunity and second, that it resolved an important question independent of the subject matter of the litigation. The court thus recognized both the finality and the collateral nature of the order sought to be appealed.

What the Fourth Circuit declined to recognize, however, was the applicability to petitioner's appeal of the third element of the collateral order doctrine, which requires that the order be "effectively unreviewable on appeal from a final judgment or so important that review should not wait upon final judgment." *Bever*, 724 F.2d at 1085. The court premised its conclusion in this regard on the presence of those claims asserted against petitioner, in his official capacity, for reinstatement and permanent injunctive relief with respect to further violations of respondents' constitutional rights. As reasoned by the court, because qualified immunity is not a defense to and does not resolve such injunctive claims, petitioner would still be required to go to trial on these injunctive claims. The order denying petitioner's qualified immunity defense would therefore be reviewable upon final judgment. 724 F.2d at 1087.

The court's conclusion in this regard unfortunately misconstrues the rationale of the collateral order doctrine. This doctrine, and the jurisdictional platform from which it is derived, 28 U.S.C. § 1291, is a rule of final decision, not of final judgment. No authority has ever suggested, as has the Fourth Circuit in this case, that a collateral order appeal must resolve the litigation for all purposes as to the appealing party. Indeed, the earlier cases which give genesis to the collateral order doctrine, including the *Cohen* case, were not suit-resolving but were, instead, merely claim-resolving. *See Cohen*, 337 U.S. 541 (1949) (pretrial appeal of an order refusing to compel plaintiffs to post security for litigation expenses); *Stack v. Boyle*, 342 U.S. 1 (1951) (pretrial appeal of the denial of bail). As stated in

Stack v. Boyle, 342 U.S. at 12: "[I]t is a final *decision* that Congress had made reviewable . . .. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment."

This Court has thus made clear that the door to a collateral order appeal may indeed remain open to certain non-suit-resolving claims. A further inquiry into the nature of the asserted claim and whether the claim is somehow lost or defeated by deferring the process of appellate review is required before this door can or should be shut. This then is the critical juncture, for it requires definition or re-definition by this Court of whether qualified immunity is intended as an immunity from trial or simply as an immunity from ultimate liability.

It cannot be seriously gainsaid that the immunity which this Court sought to recognize and implement in its *Harlow* decision was an immunity from all the ills that necessarily flow from damage claims against a public official. 457 U.S. at 814, 816. In this respect, recognition must be given to the crucial distinctions which exist between a suit for injunctive relief against a public official in his official capacity and a suit for damages against a public official in his personal capacity. *See* Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281 (1980).[3] The former suit impacts only upon the office of the public official; the latter impacts upon the official's home and livelihood. This point is perhaps best demonstrated by the fact that petitioner could quickly shed respondents' claims for in-

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[3]In this 1980 study of personal suits against public officials, which was cited with approval in *Harlow*, 457 U.S. at 814, 819, Professor Schuck of Yale Law School emphasized that damage suits against officials as individuals had extremely significant and deleterious effects while suits against governments (whether pursued in the name of the government or the official) resulted in few, if any, of these negative effects on government behavior. *Id.* at 295-315. Clearly, in *Harlow*, the Court went a long way toward meeting one of Professor Schuck's goals, protecting officials from the risk of personal liability.

junctive relief simply by shedding his office.[4] Under the Fourth Circuit's rationale, an appropriately-timed departure from public office could arguably convert a nonappealable qualified immunity claim into an appealable one. A rule of jurisdiction has thus been created which hinges upon the vagaries of a job title, rather than upon the importance of the right to be reviewed. Such a rule should not be allowed to stand.

Unlike a claim for injunctive relief, however, a damage claim cannot be so readily evaded, for it pursues the public official until resolved. It is the public official's personal millstone and his private terror. While a court might well shrug at the "chilling effect" of damage claims against the wealthy, such as Governor Rockefeller, most public officials are not Rockefellers. Petitioner's co-defendant in this case, Highways Commissioner Miller, is an engineer by training and a life-long public servant who has simply made a living wage. At least and especially for Commissioner Miller, the threatened damage claims in this and the eight related cases are a constant source of anxiety and distress. It is just this kind of anxiety, and its chilling effect on the willingness of public officials to serve, that this Court sought to dispel in its *Harlow* decision. Nevertheless, it is just this kind of anxiety which the Fourth Circuit seemingly denigrates in its opinion.[5]

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[4]After January 1985, for example, when petitioner's term of office as Governor terminates, petitioner will clearly not be a proper party to respondents' claims for injunctive relief. Petitioner will have no power or authority to reinstate these respondents; similarly, petitioner will not be in any type of position to take any action which could possibly violate respondents' constitutional rights.

[5]As stated in the Fourth Circuit's majority opinion:

> [T]he question whether a denial of the immunity claims is appealable before trial and final judgment, would appear to have little effect upon the willingness of responsible persons to serve in public office. That is one of the reasons for the existence of the doctrine of qualified immunity, and a claim of personal liability on the part of a public official should be

(Footnote continued on next page)

The Fourth Circuit's conclusion also ignores the special and dramatic concerns triggered by a jury trial, concerns which were given particular recognition by this Court as a reason for creating a qualified immunity test which could be readily determined prior to trial. As noted in *Harlow*:

> The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury [citation omitted]. As the Court observed in Tenney: "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."

457 U.S. at 814 n.23.

The Fourth Circuit's undue emphasis upon the ongoing injunctive claims, which involve a trial to the court only, thus has the effect of forcing this petitioner to submit to the risks of a jury trial and personal liability without appellate review of his immunity claim. This surely was not what this Court intended in *Harlow*. And if the dissent's assessment of the record is correct, that there is in fact not "a single shred of evidence" to support respondents' claims against petitioner, 724 F.2d at 1092 n.5, then the injustice worked by the Fourth Circuit's assessment of both *Harlow* and the collateral order doctrine becomes manifest.

A measure of irony suffuses the court of appeals' reliance upon respondents' injunctive claims as a basis for defeating the court's jurisdiction of petitioner's appeal. In *Butz v. Economou*, 438 U.S. at 507, this Court affirmatively stated that "[i]nsubstantial lawsuits can be quickly ter-

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> adjudicated with reasonable promptness. Here, however, trial on the merits is at hand, and the appellants can look forward to prompt vindication of their positions if they are correct in their claims that they were not participants in the selection process and were not otherwise responsible for it.

Bever, 724 F.2d at 1087.

minated by federal courts alert to the possibilities of artful pleading." Yet as the dissenting opinion below noted, the court of appeals' holding in this case has arguably provided artful pleaders with yet another vehicle to defeat an otherwise legitimate quest for immunity. Courts can now expect injunctive claims to appear routinely in constitutional tort litigation against public officials.

The greater irony in this case, however, rests in the fact that the injunctive claims asserted against petitioner are as insubstantial as the damage claims. Even the court of appeals recognized that the reinstatement claim against petitioner must fail since, under W. VA. CODE § 17-2A-4 (1983), only the Highways Commissioner has the authority of reinstatement. 724 F.2d at 1086 n.1 and 1091 n.3.[6] What the Fourth Circuit failed to recognize, however, is that respondents' second injunctive request, to "[p]ermanently enjoin and restrain the defendants . . . from further violating the [constitutional] rights and immunities guaranteed to plaintiffs," is similarly unfounded. Entitlement to permanent injunctive relief must be premised upon "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). In this case, however, review of both the Complaint and Amended Complaint reflects a complete absence of any allegations concerning recurring, threatened or future harm. All that is contained in these pleadings are the specific allegations relating to the 1981 terminations of these respondents. Respondents' request for permanent injunctive relief against this petitioner and his co-defendants thus appears to be "tacked on" to the Complaint almost as an afterthought. Such an afterthought should not be allowed to negate the jurisdictional switch

[6]In fact, both the Complaint and the Amended Complaint filed in this case specifically plead that Commissioner Miller "has the authority to employ or order reinstated any ex-employee or prospective new employee."

governing appellate review of petitioner's qualified immunity claim.[7]

Purely from a factual standpoint, on the basis of the record made in support of and in opposition to petitioner's motion for summary judgment, this litigation should be terminated in all respects as to petitioner. The insubstantial claim to which this Court made reference in *Harlow* is undeniably present here. Under the rationale of *Forsyth v. Kleindienst*, 729 F.2d 267, 274 (3d Cir. 1984), this alone might be sufficient to warrant appellate review of petitioner's qualified immunity claim. Certainly this alone ought to be sufficient to warrant a conclusion that petitioner's appeal presents a serious and unsettled question.

In the majority opinion below, however, the Fourth Circuit determined just the contrary, based on its rather summary review of the nature of respondents' constitutional rights. In this respect, the action of the Fourth Circuit is much like that of the D.C. Circuit, which summarily rejected jurisdiction of President Nixon's immunity claim on the apparent theory that it also did not represent a serious

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[7]A host of questions are raised by respondents' request for permanent injunctive relief. The court of appeals, for example, premised its conclusion that the permanent injunctive claim was properly asserted against petitioner since the Highways Commissioner serves at the will and pleasure of petitioner and is accordingly vulnerable to pressure from petitioner. 724 F.2d at 1086 n.1. While this was admittedly only a footnoted comment, it nonetheless suggests the court of appeals' approval of *respondeat superior* as a possible basis of liability or, at minimum, a theory of liability sufficient to state a claim against petitioner. In *Rizzo v. Goode*, 423 U.S. 362 (1976), this Court made clear that equitable relief is unavailable against a public official absent some showing of the official's *direct responsibility* for the alleged unconstitutional action. An "affirmative link" must accordingly be established between the activity complained of and the adoption of a plan or policy by the official in question showing either his authorization or approval of the activity. 423 U.S. at 371. In this case, no affirmative link is either pleaded or proved as to petitioner. All that is pleaded or offered against petitioner is an alleged statistical pattern of unconstitutional conduct which, under *Rizzo*, was expressly found insufficient to state a claim for relief. 423 U.S. at 376; *see also Lewis v. Hyland*, 554 F.2d 93 (3d Cir.), *cert. denied*, 434 U.S. 931 (1977).

and unsettled question. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982). Just as this Court concluded that the court of appeals in *Nixon* had misunderstood the importance of a President's claim of immunity, 457 U.S. at 743, so too the Fourth Circuit in this case has misunderstood the significance of a State Governor's assertion of immunity in the face of potentially nine different trials. The issue is not whether respondents' discharges may indeed have been in violation of their constitutional rights; rather, the issue is whether this petitioner is entitled to immunity in connection with respondents' claims against him personally.[8] Given the heated dissent in the opinion of the court of appeals below and the fact that the Fourth Circuit was evenly split on the question of petitioner's entitlement to rehearing *en banc*, there can be no other conclusion but that petitioner's claim of immunity does indeed present a serious and unsettled question.

It must be remembered that the collateral order doctrine of 28 U.S.C. § 1291 was born of a "practical rather than a technical construction" in order to preserve rights which would otherwise be lost absent immediate appellate review. *Cohen*, 337 U.S. at 546. In *Harlow*, this Court reaffirmed the principle that a claim of immunity is unique and perishable and that the societal purpose sought to be effected by immunity is lost once trial, or even discovery, has commenced. *Harlow*, 457 U.S. at 817-18; *see also Ward v. Johnson*, 690 F.2d 1098, 1111 (4th Cir. 1982) (en banc). It is this fact or notion which is the reason for and the basis of this appeal. Absent review by this Court of the jurisdictional question presented, petitioner's claim of qualified immunity will, most assuredly and irretrievably, be lost.

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[8]As recently recognized by the Fifth Circuit Court of Appeals in *Williams v. Collins*, 728 F.2d 721, 725 (5th Cir. 1984), a great deal of jurisdictional uncertainty has been generated by the injection of the "serious and unsettled" element in the collateral order doctrine. Significantly, in *Williams*, the court of appeals concluded that the *Nixon* Court's reliance on this element was not intended to limit "the substantive protection of the accorded immunity to protection from ultimate liability." 728 F.2d at 725.

II. Approval Of A Reduction-In-Force In State Government For Valid Budgetary Reasons Does Not Contravene Any Clearly Established Right Of Public Employees Under Either *Elrod v. Burns* Or *Branti v. Finkel.*

On February 7, 1984, less than one month after the Fourth Circuit concluded that the constitutional rights of respondents, as enunciated in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), were indeed clearly established, a different panel of the Fourth Circuit issued the first comprehensive opinion of that court on the constitutional rights implicated in a political firing case, *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984). Significantly, unlike the court in *Bever*, the court in *Jones* found that the constitutional rights implicated in cases involving alleged politically-motivated discharges are neither clear nor clearly established. As stated in the majority opinion in *Jones*:

> These cross-appeals raise difficult constitutional and procedural issues growing out of the claims of two public employees that they have been discharged in violation of first amendment rights. The difficulty is compounded by the fact that controlling doctrine — both substantive and procedural — is still evolving and is by no means yet authoritatively settled in all its critical aspects.[9]

727 F.2d at 1333.

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[9]The *Jones* court was not alone in its difficulties. In *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984) (en banc), *vacating* 703 F.2d 834 (1983), the Fifth Circuit also wrestled with the constitutional rights implicated in a political firing case. Significantly, the Fifth Circuit's analysis in *McBee* appears to diverge substantially from the Fourth Circuit's analysis in *Jones*. For example, while the Fourth Circuit in *Jones* concluded that *Branti* fundamentally expanded the constitutional right recognized in *Elrod*, 727 F.2d at 1338, the Fifth Circuit was convinced that *Branti* significantly narrowed the constitutional right recognized in *Elrod*. *McBee*, 730 F.2d at 1012. Indeed, the Fifth Circuit even recognized the possible significance of the *Branti* Court's use of the word "solely":

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The *Bever* court perceived no such difficulties in its analysis of the constitutional rights implicated in this case, however. The court simply reiterated the holdings of *Elrod* and *Branti* and stated that, in 1981, the rights of respondents "not to be discharged solely because of their political affiliation was clearly established." 724 F.2d at 1088. The fact that the discharges were made in the course of a fiscally-induced reduction-in-force was simply deemed immaterial. *Id.* at 1089.

In passing judgment as it did on the merits of petitioner's immunity claim, the Fourth Circuit unfortunately did substantial violence to the test created by this Court in *Harlow*. The test for determining petitioner's entitlement to immunity is not simply whether respondents, as public employees, had certain identifiable constitutional rights in 1981, such as the right not to be fired based solely on politics. Rather, the test is whether petitioner's conduct can be said to have violated or abridged any such clearly established rights of these respondents. *Harlow*, 457 U.S. at 818. It is the "objective reasonableness" of petitioner's conduct that must be measured, 457 U.S. at 818, and this, of necessity, entails some consideration of the action taken by petitioner "within his sphere of official responsibility." *Butz v. Economou*, 438 U.S. 478, 498 (1978) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).[10]

> The second possible narrowing articulation is the ambiguous use in a quotation, from a mere statement of the pleadings in *Elrod*, of the term "solely": "To prevail in this type action, it was sufficient, as *Elrod* holds, for respondents to prove they were discharged 'solely for the reason that they were not affiliated with or sponsored by the Democratic Party'." 445 U.S. at 517, 100 S. Ct. at 1294, quoting *Elrod*, 427 U.S. at 350, 96 S. Ct. at 2678. Would something less be "sufficient"?
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> 730 F.2d at 1012 n.9.

[10]The Fourth Circuit's analysis of petitioner's qualified immunity claim, which looks only to the nature of the right asserted by respondents, in effect places petitioner, as Governor of the State of West Virginia, on the same footing immunity-wise as County Supervisor Gum, the person responsible for selecting these respondents for termin-

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Within the sphere of his official responsibility, petitioner's action in this case was the unquestionably legal and reasonable one of authorizing the termination of fifteen hundred employees as a means of coping with and resolving a serious fiscal crisis in state government. Petitioner's *motivation* for the resulting discharges was thus not grounded in any sense on First Amendment considerations. Motivation is thus a critical ingredient of any analysis of petitioner's qualified immunity claim, particularly since respondents are unable to demonstrate any factual nexus between their selection for termination and petitioner's conduct. Even the Fourth Circuit in *Jones v. Dodson*, recognized the critical importance of this threshold motivation:

> [I]t is obvious that in this type case it makes a great difference — indeed a difference likely to be dispositive — whether a discharge was solely for reasons of raw political patronage (party affiliation alone) or was rather because of one or more specific episodes involving arguably protected "expressive conduct," or, on the contrary, was not solely for either, being instead, or in addition, for reasons unrelated to first amendment protected activity of either type.

727 F.2d at 1335.

From the Fourth Circuit's own comments in *Jones v. Dodson*, it is evident that petitioner's qualified immunity claim is inappropriately resolved solely by reference to, and reliance upon, this Court's opinions in *Elrod* and *Branti*. This then is the fatal flaw in that court's conclusion

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ation. If this is in fact a correct reading of the *Harlow* test, then *Harlow* has seemingly nullified this Court's previous statements concerning variations in the scope of immunity, "the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to based." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). Given that the Court in *Harlow* devised the objective test as a means of providing greater substantive protection to public officials, particularly high-ranking public officials confronted with insubstantial claims, the more logical construction of that test is the one argued by petitioner here.

that petitioner's appeal did not present a serious and unsettled question.

Contrary to what the Fourth Circuit suggested in its opinion below, this case is simply not an *Elrod* or a *Branti* case. In *Elrod*, this Court was confronted with the constitutional implications and limitations of the American patronage system as applied in its most classic and worst sense. Arising out of Cook County, Illinois, the *Elrod* case developed when the newly elected Democratic Sheriff of Cook County assumed office, instituted a general housekeeping which swept aside the stalwarts and supporters of the previous Republican sheriff, and placed in their stead the new sheriff's own loyal supporters. The reason for this housekeeping was uncontested: politics, purely and simply and solely politics.

In a range of opinions that alternately berated and lauded the American patronage system, this Court was able to agree on only the narrowest of holdings: "[A] nonpolicymaking, nonconfidential government employee [cannot] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." 427 U.S. at 375 (Stewart and Blackmun, JJ., concurring). In setting forth this holding, Justice Stewart made clear its limitations:

> This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular party, and I would intimate no views whatever on that question.

427 U.S. at 374.

In *Branti*, the Court subsequently reaffirmed the limiting principle and language of Justice Stewart's concurrence, holding that "it was sufficient . . . for respondents to prove that they were discharged 'solely for the reason that they were not affiliated with or sponsored by the Democratic Party.' " 445 U.S. at 517 (quoting *Elrod*, 427 U.S. at 350).

The limitations of the *Elrod-Branti* decisions are obviously of critical importance here, particularly with respect to the consistent use of, and emphasis on, politics as the *sole* motivating factor for the termination of a public employee. Here, there is no dispute that the primary causative factor involved in respondents' terminations was an economic one, not a political one. At least and especially as to petitioner, who had no hand whatsoever in selecting respondents for termination, politics was never any basis, let alone a *sole* basis, for respondents' discharge.

The principles enunciated by this Court in *Elrod* and *Branti* are thus neither clear, nor clearly applicable, to this case. Most important, both *Elrod* and *Branti* were and are factually distinguishable from this case in that neither involved an admitted independent legitimate justification, such as budgetary constraints. At least in this respect, the one other case mentioned but distinguished in the Fourth Circuit's opinion in this case, *Wren v. Jones*, 635 F.2d 1277 (7th Cir. 1980), *cert. denied*, 454 U.S. 832 (1981), is far more akin to petitioner's situation than either *Elrod* or *Branti*. In *Wren*, the Seventh Circuit determined that, whatever constitutional test was applied, the defendant public officials could not be held liable for alleged politically-motivated terminations where the terminations were part of a reduction-in-force triggered by fiscal constraints.[11] It was

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[11] In finding that the defendant public officials could not be held liable, the court in *Wren* reviewed and considered plaintiffs' allegations of politically-motivated terminations under three separate tests, thereby giving the plaintiffs the benefit of every doubt: (1) the restrictive "sole basis" test of *Elrod* and *Branti*; (2) the more permissive "motivating factor" test of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); and (3) the "balancing of interests" test of *Pickering v. Board of Education*, 391 U.S. 563 (1968). As noted, whichever test was applied, the court determined that the plaintiffs were unable to sustain their claims. For purposes of a pure immunity analysis, however, the more critical point is that the Seventh Circuit was sufficiently uncertain of the proper standard or test to be applied in a patronage termination case that it utilized all three, thus suggesting that the law with respect to alleged patronage terminations was not in any way "clearly established."

because of this factual similarity that the dissenting opinion below found the *Wren* case "instructive" and at least supportive of the merits of petitioner's qualified immunity claim. 724 F.2d at 1083.

The dispute reflected by the majority and dissenting opinions with respect to the merits of petitioner's immunity claim necessarily raises the question as to what legal principles are to be utilized by the lower courts in determining whether the law is "clearly established." In *Harlow*, this question was specifically reserved for another day:

> As in *Procunier v. Navarette*, 434 US at 565, 55 L Ed 2d 24, 98 S Ct 855, we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

457 U.S. at 818 n.32.

Although the question was also reserved in *Procunier v. Navarette*, 434 U.S. 555 (1978), this Court nonetheless provided some insight in that case as to how clearly established law is to be measured. For each of the lower court cases cited in support of the plaintiffs' claimed constitutional right, this Court identified what it considered to be significant factual distinctions which militated against any conclusion that the law was clearly established. The obvious implication of this mode of analysis is that the state of the law can only be determined by reference to cases in which the legal principles are applied in similar factual contexts. It is exactly this type of analysis, however, that the Fourth Circuit declined to apply in this case.

In the present case, authority was submitted to the court of appeals to the effect that terminations premised on budgetary restraints did not give rise to *Elrod* concerns, and that a legitimate independent justification removes the factual setting from the *Elrod-Branti* principle.[12] As

[12] *See Tanner v. McCall*, 625 F.2d 1183, 1195-96 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Wren v. Jones*, 635 F.2d 1277, 1286-87 (7th Cir. 1980), *cert. denied*, 454 U.S. 832 (1981); *Gannon v. Daley*, 561 F.

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the court stated in *Farkas v. Thornburgh*:

> A political firing violates the interdictions of the First Amendment only when the employing authority dismisses an employee "solely for political reasons." *Branti v. Finkel*, ___ U.S. at ___, 100 S.Ct. at 1301, *Elrod v. Burns*, 427 U.S. at 350, 96 S.Ct. at 2678. In other words, an independent justification coupled with a constitutionally flawed reason will not taint the Secretary's decision to terminate plaintiffs' employment.

493 F. Supp. 1168, 1174 (E.D. Pa.), *aff'd mem.*, 633 F.2d 209 (3d Cir. 1980), *aff'd mem.*, 642 F.2d 441 (3d Cir. 1981).

At a minimum, this Court's analysis in *Procunier*, coupled with the specific reservation of this issue by the Court in *Harlow*, suggests that further scrutiny of petitioner's qualified immunity claim was and is warranted with respect to the clarity of the applicable law. This is especially true in this case given the division in the court of appeals on just this issue. As noted, although the Fourth Circuit majority, in reliance upon *Elrod* and *Branti*, concluded that the constitutional right of respondents was clear, the dissent determined just the contrary. As stated by the dissent:

> [T]he reach of *Elrod* and *Branti* is simply not as clear as the majority would like to believe, and whether *Elrod* governs a case such as this, where the terminations were motivated at least in part by a fiscal crisis, is open to serious question.

724 F.2d at 1092.

The seriousness of the question in this case is compounded by yet another recent decision of the Fourth Circuit, *Harris v. Young*, 718 F.2d 620 (4th Cir. 1983). In

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Supp. 1377, 1382 (N.D. Ill. 1983); *Goldberg v. Village of Spring Valley*, 538 F. Supp. 641, 645 (S.D.N.Y. 1982); *Evenson v. Crawford*, 539 F. Supp. 686, 690 (D.N.D. 1982); *cf. Soileau v. Zerangue*, 553 F. Supp. 845 (W.D. La. 1982); *McMullan v. Thornburgh*, 508 F. Supp. 1044 (E.D. Pa. 1981). This proposition was stated most succinctly in *Gannon*, 561 F. Supp. at 1382, "It is true that if plaintiffs were to be terminated irrespective of political considerations because of a reduction in force, defendants would prevail."

Harris, a case which preceded the decision in this case but which was nonetheless not considered by the court, the Fourth Circuit ruled that the inability of the court of appeals "to unanimously decide" the immunity question is evidence of a lack of clarity in the law and warrants, in and of itself, a finding that the public officials are immune. 718 F.2d at 623-24. *Harris* thus provides a significant addition to the body of law governing interpretation of the state of the law in determining immunity claims. Despite this fact, however, the Fourth Circuit declined, by a split four-to-four vote, to rehear and reconsider its decision in this case in view of its ruling in *Harris*.

Under these circumstances, there is an obvious need for clarification by this Court of the circumstances under which the state of the law is to be determined as clearly established. Now that the state of the law has become a paramount consideration in the test devised by this Court in *Harlow*, some guidance needs to be provided to the lower courts on the extent to which evaluation of this question should include reference to the opinions of the various federal courts, and to the factual settings under which the various decisions have been made.

CONCLUSION

Harlow v. Fitzgerald, 457 U.S. 800 (1982), stands without question as a watershed case in the development of the law of official immunity. In just two short years, it has stirred a judicial controversy of significant proportions that extends not only to the philosophical one of whether damage suits against public officials truly warrant special scrutiny on a pretrial basis, but also to the jurisdictional one that ultimately shapes and determines the nature of the *Harlow* immunity defense itself.

It is precisely because the full scope of this judicial controversy is brought to the fore by the decisions of both the district court and the court of appeals in this case that this Court should allow the writ of *certiorari*. Absent al-

lowance of this writ, the erroneous dismissal of petitioner's appeal by the court of appeals and the erroneous denial by the district court of petitioner's motion for summary judgment will defeat the very objective expressed by this Court in its *Harlow* decision: that of assuring that insubstantial claims against public officials are not allowed to proceed to trial.

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Petitioner,
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June, 1984

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin,

Appellees,

versus

Walter Gilbertson and
Charles L. Miller,

Appellants,

and

John Gum, Wilton Williams,
individually and as
Commissioner of the West Virginia
Department of Highways; and
John D. Rockefeller, IV,
individually and as Governor of
the State of West Virginia,

Defendants.

No. 83-1791

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexelene Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin,

Appellees,

versus

John D. Rockefeller, IV.,

Appellant,

and

John Gum, Walter Gilbertson, Wilton Williams, Charles L. Miller, individually and as Commissioner of the West Virginia Department of Highways,

Defendants,

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden II, District Judge, 82-2506

Argued October 5, 1983 Decided January 11, 1984

Before WINTER, Chief Judge, HALL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge

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Robert B. King (Rebecca A. Betts, King, Betts & Allen on brief) for Appellant John D. Rockefeller, IV; David P. Cleek, Deputy Attorney General (Chauncey H. Browning, Attorney General; Edward W. Eardley, Steptoe & Johnson on brief) for Appellants Charles L. Miller and Walter L. Gilbertson; Timothy N. Barber (Guy R. Bucci on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

In 1981, West Virginia's Department of Highways allegedly was confronted with the need to substantially cut its expenditures. It chose to terminate the employment of a large number of lower echelon employees. According to plaintiffs, the sole or principal criterion for the selection of

those to be terminated was political party affiliation. Loyal Democrats were to be retained while Republicans and Independents were to be terminated.

There are now pending in the Northern and Southern Districts of West Virginia a number of cases brought by terminated employees of the Department of Highways alleging that their terminations were in violation of their constitutional rights of free association. The plaintiffs in this case are such terminated employees who worked under the supervision of John Gum, County Supervisor for the Department of Highways in Doddridge County. The defendants are Governor John D. Rockefeller, IV, Charles L. Miller, Commissioner of West Virginia's Department of Highways, Walter Gilbertson, District Engineer of District 4 of the Department of Highways, Gum and Wilton Williams, Chairman of Doddridge County Democratic Executive Committee. The amended complaint sought injunctive relief, including reinstatement of the plaintiffs to their former jobs, and damages. Governor Rockefeller, Commissioner Miller and District Engineer Gilbertson were sued both in their official and individual capacities, and they claim qualified immunity from the claim of damages against them personally. The immunity claim was the basis of a motion for summary judgment. The motion was denied by the district judge largely on the basis that those defendants could not reasonably have believed that a political criterion for the selection of those employees whose employment was to be terminated was permissible under the Constitution of the United States.

Those three defendants sought a certificate by the district judge for a permissible interlocutory appeal under 28 U.S.C.A. § 1292(b). The district judge refused such certification, whereupon those three defendants filed notices of appeal under 28 U.S.C.A. § 1291. The question now before us, upon a motion to dismiss the appeals, is whether these appeals are within the collateral order exception to the general rule that appeals of right are allowable only from final judgments.

I.

As developed in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, and subsequent cases in the Supreme Court, an appeal from an interlocutory order under § 1291 may be taken, if the interlocutory order conclusively determines the question in the trial court, resolves an important question independent of the subject matter of the litigation, is effectively unreviewable on appeal from a final judgment or so important that review should not wait upon final judgment, and presents a serious and unsettled question upon appeal.

In *Cohen* itself, the plaintiffs were small shareholders who brought a derivative stockholders' action within the diversity jurisdiction of the federal courts. The defendants, faced with the prospect of large litigation expenses, sought an order compelling the plaintiffs to post security for them under a state statute which required the plaintiffs to reimburse the defendants for such expenses in the event that the defendants prevailed. The district court denied the motion to compel the posting of such security.

It is obvious that in *Cohen*, if an immediate appeal was not available and the case proceeded to final judgment, the defendants would have lost irretrievably the security they sought to gain by the motion, and the purpose of the statute imposing the burden of costs upon the losing plaintiffs would have been substantially frustrated.

Orders denying claims of absolute immunity have been held within the *Cohen* collateral order exception. In *Helstoski v. Meanor*, 442 U.S. 500 (1979), the claim was one of immunity under the Speech and Debate Clause. In *Abney v. United States*, 431 U.S. 651 (1977), the claim was one of immunity under the Double Jeopardy Clause, while in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the claim was one of absolute immunity for the President of the United States.

Claims of absolute official immunity are rightfully classified with claims of immunity under the Double Jeop-

ardy Clause and the Speech and Debate Clause. In each instance, an important aspect of the absolute immunity with which the person is clothed is that he not be put to trial at all, and the right not to be put to trial at all is irrevocably lost if an order putting such a person to trial may not be reviewed until after final judgment.

The qualified immunity, with which the three appellants are cloaked, is of a lower order. It provides substantial protection for a public official who acts under circumstances in which a reasonable person would believe that his conduct did not violate established constitutional rights of another. That such a defendant not be put to the trouble of defending himself on the merits is also an aspect of immunity. Indeed, in *Harlow v. Fitzgerald*, 457 U.S. 800, the Supreme Court sought to give additional protection against being put to trial on insubstantial claims to persons possessing qualified immunity. It eliminated the subjective aspect of the qualified immunity doctrine as theretofore understood so that more claims of qualified immunity could be resolved on motions for summary judgment before trial.

It is far from clear, however, that an order denying a claim of qualified immunity is within the collateral order exception. While the Supreme Court in *Harlow v. Fitzgerald* considered the contours of qualified immunity, the case got there because the order in the district court denied Harlow's claim of absolute immunity. *See*, note *11*, 457 U.S. at 806. In *McSurely v. McClellan*, 697 F.2d 309 (D.C.Cir. 1982), the court held that an order denying a claim of qualified immunity was within the collateral order exception, a position with which a panel of this court (Judges Hall, Murnaghan, and Haynsworth) differed in an unpublished opinion in *Benford v. American Broadcasting Companies, Inc.*, (No. 83-1168, 1983).

Whatever the situation might be in other circumstances, however, the qualified immunity claimed by these three appellants cannot prevent their being put to trial. The plaintiffs seek equitable relief as well as money damages, and the appellants have no immunity from being put to

trial on the equitable claims.[1] They are the principal defenders of the state's position. They will bear a major responsibility for the outcome of the litigation and will be among the principal witnesses at the trial. Whether or not they are immune from an assessment of damages against them in their individual capacities, the litigation will demand their time and attention. A present declaration of immunity from damage claims cannot avoid the diversion of their attention from other official duties which the litigation will occasion.

If the personal pocketbooks of the three appellants are, or may be, at risk, the degree of their distraction from other official duties may be greater than it otherwise would be. Still, one would suppose that, if the risk of personal liability were eliminated, the three, as responsible public officials, would give the litigation all of the thought and attention necessary adequately to protect the interest of the state.

The doctrine of qualified immunity cannot protect a public official from a claim of personal liability. It may provide a means by which the litigation may be terminated sooner than it otherwise might be, and it provides the

[1]Our dissenting brother suggests that Governor Rockefeller and District Engineer Gilbertson were not proper parties to this action insofar as injunctive relief is sought. If reinstatement were the only equitable remedy sought, complete relief might be obtainable if Highway Commissioner Miller, or his successor, was the only named defendant, but the plaintiffs also seek an injunction prohibiting all defendants from conspiring to violate plaintiffs' constitutional right to be free of discrimination in employment based entirely upon political party considerations. Commissioner Miller serves "at the will and pleasure of the Governor," W. Va. Code 6-7-2A, and is vulnerable to pressure from the Governor. Commissioner Miller is responsible for "the selection, employment, and effective organization of all Commission personnel --" W. Va. Code 17-2A-4. Doubtless it is he who sets broad policy, but he may act only through subordinates, such as District Engineer Gilbertson, who either makes specific personnel decisions within the guidelines set by the Commissioner or who, at least, may make recommendations to the Commissioner. We conclude that Governor Rockefeller and Engineer Gilbertson are proper parties insofar as injunctive relief is sought.

official with substantive protection against personal liability for official wrongs other than a violation of established constitutional rights. In this case, however, a trial had been scheduled, and, if these appellants had nothing to do with the selection process and bore no responsibility for it, as they claim, they might have obtained a favorable judgment on the claims against them individually sooner by a trial on the merits than by appellate litigation of their immunity claims.

In these circumstances, the question whether a denial of the immunity claims is appealable before trial and final judgment, would appear to have little effect upon the willingness of responsible persons to serve in public office. That is one of the reasons for the existence of the doctrine of qualified immunity, and a claim of personal liability on the part of a public official should be adjudicated with reasonable promptness. Here, however, trial on the merits is at hand, and the appellants can look forward to prompt vindicaton of their positions if they are correct in their claims that they were not participants in the selection process and were not otherwise responsible for it.

If the question of qualified immunity is still in the case after final judgment in the district court, it may readily be reviewed in an appeal from that judgment.

Generally, in the Supreme Court the collateral order exception has been confined to situations in which the claimed right would be lost or deprived of its practical value if immediate review is not provided. This is true in absolute immunity cases in which the defendant is entitled not to be put to trial. Other preliminary orders of great importance to the litigants have been held not within the doctrine. Pretrial discovery orders may not be reviewed before final judgment. *Cobbledick v. United States*, 309 U.S. 323 (1940), and *United States v. Ryan*, 402 U.S. 530 (1971). An order denying class certification is not within the doctrine. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Nor is an order refusing to disqualify counsel. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). Litigants may desire early appellate rulings on important

orders of that sort, but the collateral order exception is a narrow one and reserved for rare cases. Such a one was *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), where the question was one of venue in protracted litigation against two national banks which asserted a right not to be put to trial at all in the court in which the action had been brought. The question of venue is subject to appellate review after final judgment, but the court was moved by the specter of the great waste that would occur if the extensive litigation were permitted to proceed in the wrong court.

There are no comparable circumstances here. There is no problem of jurisdiction or venue in the district court. The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgment.

In the lower federal courts, orders denying claims of absolute immunity have been held appealable before trial. *Chavez v. Singer*, 698 F.2d 420, 421 (10th Cir. 1983); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-1209 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (*Forsyth I*); *Forsyth v. Kleindienst*, 700 F.2d 104 (3d Cir. 1983) (*Forsyth II*). In *Forsyth I*, an interlocutory appeal from an order denying a claim of qualified immunity was not allowed, and the court said it was not even seriously contended that those orders met the *Cohen* requirements. In *Forsyth II*, the majority expressed skepticism about the appealability of the denial of summary judgment on the claim of qualified immunity referring to the Supreme Court's decision in *Harlow v. Fitzgerald* and the decision of the United States Court of Appeals for the District of Columbia Circuit, mentioned above, in *McSurely v. McClellan*. By eliminating the subjective component of the qualified immunity claim, the Supreme Court clearly intended to facilitate disposition of claims of qualified immunity on summary judgment motions, but one must read much into that opinion to conclude that the Supreme Court also intended that denials of such motions should be immediately appealable. If, however, it

may ultimately be determined that such an order is immediately appealable if the effect of the immunity claim would be to terminate the litigation insofar as the immune defendant is concerned, this case is different. Partial summary judgment for these appellants on the damages claims against them individually would not terminate the litigation nor avoid the necessity for a trial and active participation in it by these appellants. Under these circumstances, we cannot read *Harlow v. Fitzgerald* as a basis for a conclusion that this denial of summary judgment meets the *Cohen* requirements.

II.

There is another reason for dismissal of this appeal as premature.

One of the requirements for immediate appealability of a collateral order under the *Cohen* doctrine is that it present a serious and unsettled question of law. A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that.

In 1981, when these plaintiffs were terminated as employees of the Department of Highways, their constitutional right not to be discharged solely because of their political affiliation was clearly established. *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). The plaintiffs were not confidential employees nor policy makers. Indeed, there is no contention here that they are not the kind of employees who enjoy the protection of the *Elrod-Branti* principle.

Instead, the defendants contend that their discharge was not solely because of the lack of affiliation with the Democratic Party. It was for economic reasons, they say.

We may accept the fact that in 1981 fiscal considerations made a reduction in force in the Department of Highways

necessary or appropriate. The decision that a reduction in force is necessary, however, was only a backdrop. It did not identify those employees to be terminated or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were to be released and would effect their actual terminations. The *Elrod-Branti* principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force.

It is true that in both *Elrod* and *Branti* the patronage system had been operating to procure the discharge of members of an unfavored party to replace them with members of a favored party. Proof that the discharges were solely for political purposes may be facilitated when there are immediate replacements by members of a favored party, but the Constitution protects the rights of existing employees against discharge solely for political reasons. If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations, the *Elrod-Branti* principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle.

The defendants place major reliance on *Wren v. Jones*, 635 F.2d 1277 (7th Cir. 1980), but that case is of no assistance to them. In that case, a court had ordered the reinstatement of a number of Democrats who had been discharged solely for political reasons. The affected departments of the State of Illinois discharged a number of Republicans in order to make room for the Democrats to be reinstated. Considerations of fiscal limitations and efficiency militated strongly against the employment of both groups. In that case, however, the pool from which the employees to be terminated were selected was composed entirely of Republicans. Republican affiliation was not the criterion of selection, and it was properly concluded that economic necessity was the reason for their termination.

Wren is thus nothing like this case where the allegation is that party affiliation was the sole criterion by which these plaintiffs were selected for discharge. At least so far, this is not a mixed motive case. Economic considerations may have occasioned the reduction in force. They did not dictate, or even address, the political criterion by which those to be discharged allegedly were chosen.

III.

Because this collateral order is not within the *Cohen* exception to the rule that appeals of right may be taken only from final judgments, the appeal is dismissed.

APPEAL DISMISSED.

HALL, Circuit Judge, dissenting:

I cannot accept the majority's dismissal of these appeals as interlocutory. In concluding that pre-trial review is unavailable, the majority has ignored both the facts of this case and applicable law. In my view, the district court's order, denying appellants' claims of qualified immunity, is precisely the type of preliminary ruling which necessitates immediate appellate review. For this reason, I must dissent.

I.

This case is one of nine civil actions currently pending against West Virginia's Governor Rockefeller, Department of Highway (DOH) Commissioner Miller, and various DOH District Engineers for their alleged participation in a conspiracy to terminate some sixty former DOH employees for political reasons. In this case, as in the others, plaintiffs are Republicans and Independents, who seek to hold Governor Rockefeller, a Democrat, and other state officials personally liable for monetary damages. The state defendants deny that they are liable for damages because of their entitlement to qualified or "good faith" immunity.

In the proceedings below, Governor Rockefeller, Commissioner Miller, and District Engineer Gilbertson moved

for summary judgment based on their official immunity. The parties agree that the matter was ripe for summary disposition and that no facts regarding the immunity claim remain unresolved. According to the uncontradicted evidence, neither Governor Rockefeller nor the other two appellants were personally involved in the selection of these nine plaintiffs for termination. Moreover, the record also clearly establishes that none of the three at any time considered, suggested, authorized, or otherwise intended that the terminations be politically motivated. Finally, as plaintiffs concede, it is clear that the terminations arose as a result of an economically necessitated reduction in force.[1] Notwithstanding these undisputed facts, the district court denied the motions for summary judgment and these appeals followed.

In my view, the majority erroneously holds that the appeals from the denial of summary judgment must await the outcome of the trial. Under 28 U.S.C. § 1291 only appeals from final judgments are ordinarily permitted. Nevertheless, as the majority notes, an exception to this general rule, known as the collateral order doctrine, has been recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), and other cases. To fall within the collateral order exception, the order appealed from must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment; and (4) present a serious and unsettled question on appeal.

In the companion cases of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court recognized the applicability of the collateral order doctrine to both absolute and qualified immunity claims and the need for pre-trial appellate re-

[1]The record in this case demonstrates that because of the state's fiscal crisis in late 1980, over 1,500 DOH employee positions were eliminated in 1981, the year of plaintiffs' terminations. As of now, more than 2,600 DOH employees have lost their jobs since the end of 1980. This represents an elimination of approximately one-third of the DOH workforce as it existed in late 1980.

view of the denial of such claims. Other Circuit Courts, applying *Harlow*, have affirmed the appropriateness and need for immediate review of official immunity claims. *Chavez v. Singer*, 698 F.2d 420, 421 (10th Cir. 1983); *McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208-1209 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (*Forsyth I*); *Forsyth v. Kleindienst*, 700 F.2d 104 (3d Cir. 1983) (*Forsyth II*). The majority, however, has concluded that *Harlow* is not controlling and that these appeals do not meet the four criteria of the collateral order exception to 28 U.S.C. § 1291. I disagree. In my opinion, if ever there was a case which justified application of *Harlow* and the collateral order doctrine, this is certainly the one.[2]

II.

Official immunity has long been recognized as a concept essential to the effective functioning of government. *Butz v. Economou*, 438 U.S. 478 (1978). As noted by the Supreme Court in *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974), officials, including a state's chief executive officer and his aides, must be permitted "to perform their official functions free from the threat of suits for personal liability." The Supreme Court in *Harlow* expressed its frustration with the increasing burdens imposed on public officials in defending against "insubstantial claims" and made clear that suits brought against public officials for alleged con-

[2]The majority's reference to the unpublished decision in Benford v. American Broadcasting Companies, Inc., et al., No. 83-1168 (4th Cir., April 11, 1983), in no way deters me from finding *Harlow* applicable in this instance. The two cases are factually distinct. In *Benford*, we simply held that an immediate appeal of the district court's order denying summary judgment was not warranted when the qualified immunity defense was not finally determined and where the disappointed movants could still present facts at trial in support of their claim to immunity. In that case, the district court ruled that the Congressional staff defendants had acted beyond the scope of their authority and, therefore, lacked standing to assert a qualified immunity defense; however, in deciding against the Congressional defendants, the district court left open the possibility that they could prove certain facts at trial which would entitle them to qualified immunity. Here, on the other hand, all of the facts pertaining to the quaified immunity defense asserted by Governor Rockefeller and the other state officials have been presented and the district court has conclusively resolved their immunity claims against them.

stitutional torts should be screened at the earliest stages of litigation:

> In *Butz,* we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U.S., at 507. . . We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. Id., at 508.

457 U.S. at _____, 102 S.Ct. at 2739, n.35.

Accordingly, the Supreme Court departed from the earlier requirement that in order to be entitled to qualified immunity an official must show both objective and subjective good faith. Under *Harlow,* it is sufficient for purposes of good faith immunity if the conduct in question did not violate clearly established rights which a reasonable person would have known. In recasting this standard, the *Harlow* Court noted:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to the society as a whole [footnote omitted]. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA 2 1949), cert. denied 339 U.S. 949 (1950).

457 U.S. at _____, 102 S.Ct. at 2736.

As the District of Columbia Circuit held in *McSurely,* the Supreme Court in *Harlow* "consciously sought to facilitate summary disposition of insubstantial claims against governmental officials. Consequently, . . . appellate review

of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity." 697 F.2d at 316. Similarly, the Third Circuit in *Forsyth II*, 700 F.2d at 105, stated that a claim of absolute immunity " . . . protects a right not to be subjected to trial - a right that is lost if appellate review awaits final adjudication. It follows therefore, that a stay [of the trial] must be granted or the defendant will be deprived of the benefits of adjudication before trial."

The majority, however, rejects the *McSurely* and *Forsyth II* analysis. It stresses in Part I of its opinion that, because plaintiffs seek reinstatement to their former jobs as well as damages, appellants must proceed to trial in any event, and, therefore, the denial of immediate appellate review does not result in an irretrievable loss to appellants. This mistaken view ignores the fact that neither Governor Rockefeller nor District Engineer Gilbertson are proper parties for injunctive relief.[3] Furthermore, the majority's holding can easily lead to the pernicious practice of tacking on a claim for injunctive relief in order to avoid summary judgment and force officials to go to trial on meritless damages actions. In an appropriate case, the majority's rationale might have merit. It can have no application, however, in a case such as this, where public officials are contesting the right to be haled into court in their personal capacities[4] and face trial on what is clearly an insub-

[3]Under W. Va. Code § 17-2A-4 (1983), only Commissioner Miller has the authority to order reinstatement.

[4]The majority concludes that it makes no difference whether the personal pocketbooks of appellants are at risk or not insofar as their distraction from official duties is concerned. This position, however, completely overlooks the fact that an official being sued personally for money damages may be required to retain private counsel at his own expense. Furthermore, the fear of being sued and held personally liable for damages is a far cry from a suit for reinstatement or injunctive relief, which public officials face regularly in the course of performing their

(Footnote continued on next page)

stantial claim for damages.[5]

III.

Nor can I accept the majority's conclusion in Part II of its

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duties. As the Supreme Court noted in *Harlow*, 457 U.S. at ____, 102 S.Ct. at 2736, 2738, the threat of personal liability could deter all but the most resolute or irresponsible from discharging their public duties, or even from being willing to serve in public office.

[5]A review of the current state of the record quickly reveals the insubstantiality of plaintiffs' claim. Plaintiffs allege that appellants participated in a scheme to oust them from their jobs for political reasons, or that appellants knew, or should have known, that the terminations were illegal and did nothing to prevent them. These allegations, however, when submitted to the test of appellants' motions for summary judgment, are not supported by a single shred of evidence, and the majority cites none.

Appellants' affidavits substantiate their defense that the terminations were due to financial necessity and indicate that none of the appellants had any personal involvement whatsoever in plaintiffs' selection for discharge by another defendant, County Supervisor John Gum. That plaintiffs were discharged solely by Gum, and without consultation, is further supported by Gum's deposition, in which he stated that he alone made the decision to terminate plaintiffs.

None of plaintiffs' submissions, in response to these affidavits and supporting documentation, in any way contradict appellants' evidence. In fact, one of plaintiffs' submissions, a deposition taken of Governor Rockefeller in connection with other litigation, reveals that political hiring and firing was specifically disavowed by the Rockefeller administration. It further demonstrates that 55% of the DOH employees terminated in 1981 were persons hired by Governor Rockefeller's administration, while only 38-39% of those terminated were persons hired by the former Republican administration.

I am thus at a loss to understand the district court's rationale for allowing the damages claim to proceed to trial on the ground that "[p]laintiffs' response . . . sets forth allegations which if assumed to be true for the purposes of this motion preclude summary judgment." Under Fed. R. Civ. P. 56(e), once a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading." The rule requires the responding party to set forth specific *facts* showing that there is a genuine issue for trial or else have summary judgment entered against him. The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations. By dismissing these appeals, the majority seeks to sanction this unwarranted practice.

opinion that these appeals do not present a serious and unsettled question and thus fail to meet another requirement of the collateral order doctrine. Under the Supreme Court's plurality opinion in *Elrod v. Burns*, 427 U.S. 347 (1976) and its holding in *Branti v. Finkel*, 445 U.S. 507 (1980), nonpolicymaking, nonconfidential government employees may not be discharged from a job *solely* because of their political party affiliation. Beyond that, the reach of *Elrod* and *Branti* is simply not as clear as the majority would like to believe, and whether *Elrod* governs a case such as this, where the terminations were motivated at least in part by a fiscal crisis, is open to serious question.

As recognized in *Abraham v. Pekarski*, 537 F. Supp. 858, 863-64 (E.D. Pa. 1982):

> Few Supreme Court decisions in recent years have generated as much litigation and controversy as have *Elrod* and *Branti*. Moreover, because of the lack of a majority opinion in *Elrod*, a problem not cured by *Branti*, the sweep of *Elrod* and *Branti* has been subject to a good deal of critical analysis seeking to assess their reach [footnotes omitted].[6]

The decisions of our own Court reflect the continued uncertainty surrounding *Elrod*'s scope and applicability. In *Ramey v. Harber*, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979), this Court noted the factual distinctions between that case, which involved a newly elected sheriff's failure to rehire deputies who had actively campaigned against him, and the *Elrod* case. Although the majority found it unnecessary to determine the applicability of *Elrod* to the *Ramey* facts, it nonetheless expressed its reservations in this regard: "The district court's

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[6] Judge Aldisert of the Third Circuit Court of Appeals made the following observation in his concurring opinion in *Loughney v. Hickey*, 635 F.2d 1063, 1069 (3d Cir. 1980): "I suggest that the various majority opinions in both *Elrod* and *Branti* are not capable of public comprehension."

decision is supported by the broad sweep of the *Elrod* plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices." 589 F.2d at 757.[7]

Courts in other Circuits have also wrestled with the meaning of *Elrod*. In spite of the majority's view that the Seventh Circuit's decision in *Wren v. Jones*, 635 F.2d 1277 (7th Cir. 1980), *cert. denied*, _____ U.S. _____, 102 S.Ct. 129 (1981), is of no aid to appellants, I find that case instructive. In *Wren*, the Seventh Circuit was called upon to weigh the fiscal interest of the State against the *Elrod* rights of public employees in Illinois. In this connection the *Wren* Court held that "[i]n view of the involuntary requirement that [certain] plaintiffs be reinstated, *and of the fiscal exigencies*, . . . the State's interest in maintaining prudent control over the efficient use of their [sic] resources outweighs any minimal impact on the plaintiffs' right to political association." *Id.* at 1287. (emphasis added).

Whether or not *Elrod* applies in the instant case, where a substantial portion of the public employment sector had to be permanently eliminated for legitimate financial reasons, is, therefore, by no means clear and settled. Except for economic necessity, all of the plaintiffs would have remained in their DOH jobs in 1981. Thus, the applicability of *Elrod* to the facts of this case, and the constitutional violations which plaintiffs assert, are highly questionable and at the very least justify pre-trial review by this Court under the collateral order doctrine.

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[7]Other decisions in this Circuit which reflect the continuing uncertainty over the scope of *Elrod* include: Delong v. United States, 621 F.2d 618, 625 (4th Cir. 1980) (Dumbauld, J., concurring: "appellant's situation does not fall within *Elrod*. He has not been discharged, or threatened with discharge. He has simply been *transferred* . . .") and Johnson v. Bergland, 586 F.2d 993, 996 (4th Cir. 1978) (Hall, J., dissenting: ". . . the majority's reliance on *Elrod v. Burns* . . . is misplaced; there the infringement of first amendment rights was direct and immediate, not indirect and speculative.")

IV.

The majority's denial of pre-trial review under the circumstances presented in this case flies in the face of *Harlow* and conflicts with decisions by other Circuit Courts which have allowed immediate review of the denial of official immunity claims. As a result, appellants have had their claims to qualified immunity conclusively resolved against them. They have irretrievably lost whatever claim they may have to official immunity, not only in this case, but possibly in the eight other related cases now pending against Governor Rockefeller, Commissioner Miller, and other District Engineers like Gilbertson. Denying appellate review irreparably harms not only these public officials, but also the public at large and the very concept of official immunity.

For the foregoing reasons, I would hold that we have jurisdiction of these appeals under the collateral order doctrine and would address the immunity claims on their merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

CHARLESTON

ENTERED
JUL 22 1983
Civil ORDER BOOK
NO 102 PAGE

JOHN M. BEVER, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 82-2506

JOHN GUM, et al,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon numerous dispositive motions by Defendants Gum, Gilbertson, Miller[1] and Rockefeller. Certain of the motions challenge Plaintiffs' original complaint, which has since been superseded by the amended complaint filed March 28, 1983. Certain other motions have been rendered moot by this Court's continuance of the injunction hearing previously scheduled for March 7, 1983. One motion is unopposed. Remaining are four dispositive motions post-dating the amended complaint, which are opposed by Plaintiffs. These latter four motions substantially overlap; two were submitted on behalf of Defendant Rockefeller, two were submitted by the Defendants Gilbertson and Miller. Prior to reviewing the substance of these motions, the Court deems it appropriate to summarize the events of this litigation from its inception to the present time.

Plaintiffs originally brought this action in the Circuit Court of Kanawha County, West Virginia. Subsequently,

[1]Defendants Gum, Gilbertson and Miller are jointly represented.

Defendants filed a petition for removal[2] pursuant to 28 U.S.C. §1441; Plaintiffs responded by moving to remand the case back to Kanawha County. By Order entered November 17, 1982, this Court held that, since the action had been properly removed under the provisions of 28 U.S.C. §1446, and since federal question jurisdiction existed, the Court had no discretion to remand. Discovery then commenced in anticipation of the March 7, 1983, injunction hearing.

Redress is sought in this action for the alleged deprivations of Plaintiffs' right to free political association and affiliation, which they contend occurred under a system of political patronage in effect within the Department of Highways (DOH), and specifically in Doddridge County, West Virginia. The alleged "political firing" of the ten Plaintiffs, all registered Republicans, was said to have been perpetrated by Defendants under the democratic administration of West Virginia Governor John D. Rockefeller IV. Three of the remaining Defendants, John Gum, Walter Gilbertson and Charles L. Miller, were supervisory officials of the DOH during the period in question; Defendant Wilton Willams was democratic committee chairman of Doddridge County, West Virginia, the situs of Plaintiffs' employment.

This action was brought pursuant to the provisions of Title 42, United States Code, Section 1983 and 1985, and under the authority of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). Plaintiffs alleged in their complaint two alternative theories of liability: (1) that all Defendants participated directly in a conspiracy to deprive them of their civil rights; and/or (2) that the Defendants Gilbertson, Miller and Rockefeller indirectly violated their rights by failing to act when they "knew or should have known" of the alleged unconstitutional conduct.

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[2]All Defendants were at that time jointly represented by the Attorney General of West Virginia and counsel for the state insurance carrier.

Defendants answered the complaint, denying unlawful conduct and affirmatively asserting both their official immunity and their good faith in acting as officers of the state.[3] The immunity defense, although not raised by motion prior to the scheduled prehearing conference, was nevertheless considered by this Court in anticipation of the March 7 injunction hearing. The Court determined, and so informed the parties on March 2, 1983, that under the Eleventh Amendment to the United States Constitution and under *Edelman v. Jordan*, 415 U.S. 651 (1974), *Alabama v. Pugh*, 438 U.S. 781 (1978), and *Quern v. Jordan*, 440 U.S. 332 (1979), Plaintiffs were precluded from obtaining injunctive relief in the form of back pay from the state officials *in their official capacities.*[4] Plaintiffs were then given the option of (a) proceeding against Defendants on March 7 solely to determine their entitlement to prospective injunctive relief, i.e., reinstatement, or (b) of amending their complaint to replace their back pay request with a prayer for money damages in that amount from Defendants *as individuals.*[5] Plaintiffs chose to amend their complaint.

The motions of Defendants Gum, Gilbertson, Miller and Rockefeller in their individual capacities for judgment on the pleadings are based upon the character of the relief requested in Plaintiffs' original complaint. While Defendants as individuals may have been entitled to partial judgment on the pleadings had the complaint not been amended, since the injunctive relief sought was recoverable merely from Defendants as State officials, because the Plaintiffs' claim now seeks money damages from De-

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[3]Wilton Williams, however, was not a state employee and thus could assert no immunity or good faith defenses.

[4]This decision was made prior to the issuance of the West Virginia Supreme Court of Appeals' decision in *Martin v. West Virginia Board of Regents*, No. 15438 (June 30, 1983).

[5]The complaint as originally filed sought only injunctive relief: That is, retrospective relief in the form of back pay; and prospective relief in the form of reinstatement to their previously held positions.

fendants, Defendants' motions are moot and, therefore, must be denied. *See Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1975); *Miller v. Board of Education of Cty. of Lincoln*, 450 F.Supp. 106 (S.D. W. Va. 1978).

Those issues revolving around Plaintiffs' original prayer for relief were, as noted, heard by the Court at a prehearing conference conducted on March 2, 1983. Because Plaintiffs' opted at that time to amend the complaint, this Court ordered the March 7, 1983, hearing continued and consolidated with the August 22, 1983, trial on the merits. By so doing, the Court thus rendered moot Defendants' motions for continuance and consolidation.

One other motion pre-dates Plaintiffs' amended complaint, that is, the motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment. The bases for that motion are trifold: First, that the complaint fails to set forth Plaintiffs' allegations with the requisite particularity; second, that the record does not support the charges; and third, that Defendants are entitled to judgment because of their official qualified immunity. The court is of the opinion to deny this motion, primarily because the pleading and immunity issues and the discussion of the merits are addressed in subsequent motions post-dating the amended complaint.[6]

Remaining for decision, then, are six dispositive motions which post-date the amended complaint. Two motions filed on behalf of Defendants Gilbertson and Gum parallel two filed by Defendant Rockefeller; each have moved (1)

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[6]The pleading issue is raised in Defendant Rockefeller's motion to dismiss the amended complaint and the motion of Defendants Gilbertson and Gum for judgment on the pleadings and for summary judgment; the immunity issue is addressed in the subsequent motions by Defendants Gilbertson, Miller and Rockefeller for summary judgment based upon official immunity. That portion of Defendant Rockefeller's motion which is concerned with the merits is considered *infra* together with Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary request.

for dismissal of Plaintiff, Drexelene Perrine, and (2) for summary judgment based upon official immunity. In addition, Defendant Rockefeller has, as noted, moved for dismissal of the amended complaint, a motion which presents essentially the same allegations as Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment. The motion for dismissal of Plaintiff Perrine is unopposed by Plaintiffs and, therefore, may be granted without further discussion. The balance of the dispositive motions are, however, opposed by Plaintiffs and memoranda in response thereto, supplemented by Plaintiffs' counsel's affidavit[7] have been submitted.

I. Defendant Rockefeller's Motion to Dismiss the Amended Complaint and Defendants Gilbertson and Miller's Motion for Judgment on the Pleadings and for Summary Judgment

These dispositive motions, although variously styled, present essentially the same arguments, that is, insufficiency of the pleadings, and failure to state a claim. In addition, Defendant Rockefeller asserts that injunctive relief is inappropriate in this case and that, in any event, injunctive relief against him as Governor of West Virginia, is precluded both on the grounds of immunity and because he is not a proper party to afford Plaintiffs such relief.

Defendants' argument relating to insufficiency of the pleading is based primarily upon the degree of particularity with which Plaintiffs have supported their claims through factual allegations in the complaint. In support of this argument, Defendants point to two specific defects: First, that the conspiracy claim failed to allege with particularity any "overt act" which would indicate Defendants actually participated in a conspiracy; and second, that Plaintiffs' "knew or should have known" claim is supported only by conclusory allegations, which indicate

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[7]This affidavit is the subject of a motion to strike by Defendant Rockefeller. That motion will be addressed below.

that Plaintiffs rely solely upon the doctrine of *respondeat superior* for their recovery.

In the Court's opinion, Plaintiffs support both their theories of liability, i.e., the conspiracy claim under 42 U.S.C. §1985(3) and the "knew or should have known" claim under Section 1983, by detailed allegations.[8] The complaint describes the political history of the DOH, the chronology and character of the Defendants' service with State government, the relationships of the Defendants with each other and with the Plaintiffs, the opposing party ideologies of Plaintiffs and Defendants, the details of Plaintiffs' employment history and their terminations, a statistical survey of employment practices of the Defendants within the DOH relative to the hiring of Democrats and Republicans, the alleged power of Defendants Gilbertson, Miller and Rockefeller to control discriminatory practices, their alleged knowledge of such practices, and their alleged intent to continue, and/or failure to prevent such practices. (Complaint, ¶¶3-18).

Defendants correctly argue that civil rights pleadings must set forth with particularity those facts upon which the pleader relies for relief. *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 884 (4th Cir. 1979); *Picking v. State Finance Corporation*, 332 F.2d 1399 (D. Md. 1971) *affirmed* 450 F.2d 881 (4th Cir. 1971) *cert. denied* 405 U.S. 1048; 2A Moore's Federal Practice, §8.17[5] at 8-182 (1979). The purpose of such a requirement, however, is not to require Plaintiffs to plead all of their evidence but merely to provide the Defendants with facts sufficient to apprise them of the nature of the charges in order that they may adequately plead and defend the cause. *Picking v. State Finance Corporation, supra; Vasquez v. Ferre*, 404 F.Supp. 815 (D. N.J. 1975); *Jordan v. Wolke*, 460 F.Supp. 1080 (E.D. Wis. 1978). Plaintiffs need not plead evidentiary facts in

[8]Four pages of the complaint are devoted to the explication of facts relied upon for relief by Plaintiffs.

the complaint. *E.g. School District of Kansas City, Missouri v. State of Missouri,* 460 F.Supp. 421 (W.D. Mo. 1978); *Yates v. Mahogony Ass'n.,* 129 F.2d 227 (3d Cir. 1941).

Pleadings are to be judged by substance, rather than by form, to facilitate the fair and just resolution of controversies between litigants; they should not be construed to raise barriers which prevent the achievement of that end. *Matz v. Grasselli Chemical Co.,* 303 U.S. 197 (1938); *Conley v. Gibson,* 355 U.S. 41 (1957). In *Ratcliffe v. Insurance Company of N. America,* 482 F.Supp. 759 (E.D. Pa. 1980) the court was presented with the precise argument being made by Defendants here, i.e., that because civil rights cases require pleadings be made with factual specificity, Plaintiffs' claim should be dismissed. The court stated there that even though certain portions of the complaint were cast in conclusory language, where other sections alleged discrimatory acts with sufficient specificity to meet the requirements of *Rule* 8, Federal Rules of Civil Procedure, and to give adequate notice of the charge to be defended, Defendants' motion to dismiss the complaint would be denied.

Similarly, in *School District of Kansas City, Missouri v. State of Missouri, supra,* the complaint was held reviewable under the provisions of *Rule* 8(a) requirements, not against some stricter standard.[9] The court held there that the complaint was sufficient when it alleged that defendants transferred students for purposes of segregation, discriminated in employment, prevented changes in district boundaries which would have reduced segregation, and failed to correct the effects of pre-1954 segregation. The allegations set forth in Plaintiffs' complaint here are no less specific than those found sufficient in *School District,* and the Court would find, therefore, that the complaint was pleaded with sufficient particularity.

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[9]This Court is of the opinion that those cases holding that greater specificity is required in civil rights complaints than in other types of complaints are not altering the basic rationale behind *Rule* 8, but are

(Footnote continued on next page)

The Court's ruling just stated applies to both the "knew or should have known" claim and the conspiracy claim. Defendants argue that the conspiracy claim is defective as failing to allege an "overt act;" however, the Court deems that allegation in which Plaintiffs state they were terminated by reason of their political affiliation to meet that requirement specifically.[10] In reviewing the sufficiency of a complaint alleging conspiracy, the Court must take cognizance of the fact that Plaintiffs' access to specific facts surrounding a civil rights conspiracy is often limited; therefore, a certain degree of liberality in constructon is warranted, particularly with regard to those allegations concerning combination of the conspirators. *Vasquez v. Ferre, supra.* The complaint is sufficient when it otherwise states a claim upon which relief can be granted.

Having found the complaint filed herein to be sufficiently specific to inform the Defendants of the charges which they are to defend, the Court now proceeds to determine the issue of whether a claim has been stated. Defendants do not seriously contend that political discrimination provides no basis for a cause of action in this Court; they could hardly do so in light of *Elrod v. Burns, supra,* and *Branti v. Finkel, supra.* Their argument, instead pivots around two

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merely acknowledging the necessity for protection of Defendants' right to be adequately advised of the charges against him in an area of law wherein conclusory allegations provide the potential for abuse of the judicial process. The requirements of *Rule* 8(a) incorporate the rules of notice pleading, and are accorded a liberal construction. *Conley v. Gibson, supra.*

[10]Devitt and Blackmar defines an "overt act" as:

> "Any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy . . . . It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows or tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy . . . ."

2 Devitt and Blackmar, *Federal Jury Practice and Instructions,* §27.07 at 22 (1977).

supplemental contentions: (1) That because the pleadings are nonspecific as to particular actions taken by each Defendant, the Court can only conclude that Plaintiffs' theory of liability rests upon the doctrine of *respondeat superior;*[11] and (2) that, in the absence of such specific allegations, Defendants' averments of good faith should permit the Court to award Defendants judgment on the merits. The Court is not persuaded that Plaintiffs' complaint is deficient for either reason.

With regard to those contentions addressed to the merits, the Court would note that the parties have engaged in extensive discovery during the pendency of this action. In their second argument, Defendants have not made reference to the record in any comprehensive fashion to support their position that summary judgment on the merits is appropriate. Had they done so, the Court believes that material issues of fact would be shown in dispute. The complaint is not deficient for failing to overcome Defendants' allegations of good faith: Indeed, the United States Supreme Court held recently in *Gomez v. Toledo*, 446 U.S. 635 (1980) that plaintiff need not even allege bad faith in his complaint, that good faith is merely a matter of defense to be proved or disproved at trial. Clearly, then, Defendants' second argument must fail as a basis for dismissal of this action.

Defendants' first argument premises upon a finding by this Court of insufficient particularity in the pleading. Since the Court has determined otherwise, the sole question remaining is whether proper theories of liability have been asserted. To establish a conspiracy claim under Section 1985(3), Plaintiffs must allege four elements, that is:

1. That Defendants did conspire,

2. For the purpose of depriving, either directly or in-

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[11] Plaintiffs cannot base a civil rights claim upon the theory of *respondeat superior. Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir. 1977).

directly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

3. That one or more of the conspirators did, or caused to be done, any act in furtherance of the object of the conspiracy, whereby another was

4(a) Injured in his person or property, or

4(b) Deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). *Brekenridge* involved an alleged deprivation of the black plaintiffs' right to free speech, assembly and association; the United States Supreme Court held these allegations supported the requisite animus to deprive plaintiffs of equal enjoyment of a legal right so as to state a claim under Section 1985(3). Although *Breckenridge* involved allegations of invidious *racial* discrimination, a Section 1985 action may properly be based upon *political* class-based animus, as, indeed, plaintiff did in *Elrod*. *See also, Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981); *Hampton v. Hanrahan*, 600 F.2d (7th Cir. 1979) *reversed in part on other grounds* 446 U.S. 754, *rehearing denied* 448 U.S. 913; *Gibbins v. Bond*, 623 F.Supp. 845 (W.D. Mo. 1981) *affirmed* 668 F.2d 967 (8th Cir. 1981). *Cf., Marino v. Bowers*, 657 F.2d 1363 (3d Cir. 1981). Since Plaintiffs have alleged facts which, if assumed to be true, allege each element of a cause of action under Section 1985(3),[12] it is clear that a claim upon which relief can be granted has been stated in Plaintiffs' complaint.[13]

The cause of action previously styled a "knew or should have known" claim falls under the provisions of 42 U.S.C. §1983. As Plaintiffs correctly argue, only two allegations

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[12]Plaintiffs have alleged (1) a conspiracy; (2) their membership in a class of persons deprived of equal protection of the laws; (3) an overt act; and (4) injury to their property interest in employment.

[13]Plaintiffs might also establish their conspiracy claim pursuant to the provisions of Section 1983, under the following analysis.

are necessary to state a claim under that section: (1) That some person deprived Plaintiffs of a federal right; and (2) that such person acted under color of state or territorial law. *Gomez v. Toledo, supra. Elrod v. Burns* makes clear that the acts complained of by Plaintiffs here implicate both First and Fourteenth Amendment rights. Defendants, with the exception of Defendant Wilton Williams, admit they were acting under color of state law when the alleged terminations occurred. These facts are sufficient without questions to state a claim against Defendant Gum. However, Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient based on Plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these Defendants in the acts complained of. *See Rizzo v. Goode,* 423 U.S. 362 (1976). In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant "knew or should have known" of the challenged practice, but evidenced deliberate indifference to Plaintiffs' constitutional rights. *Orpiano v. Johnson,* 632 F.2d 1096 *cert. denied* 450 U.S. 929. Since, in an action under the authority of *Elrod* and *Branti,* Plaintiffs' *prima facie* case does not include *dis*-proof of an independent reason for the discharges, *Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1976), *Miller v. Board of Education of County of Lincoln, supra,* the complaint herein, again assuming the truth of the facts alleged for the purposes of this motion, states a claim upon which relief can be granted under Section 1983. *See also Brule v. Southworth,* 611 F.2d 406 (1st Cir. 1979); *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980) *cert. denied* 451 U.S. 907 (1981). In summary, both of the theories of liability relied upon by Plaintiffs properly assert the stated causes of action.

One additional ground for dismissal was raised by Defendant Rockefeller in his motion, although not briefed in his memorandum: That the injunctive relief sought by Plaintiffs was not properly directed toward him as Governor. The Court is of the opinion that this argument lacks

merit, in view of the nature of the injunctive relief sought, i.e., a permanent injunction against all Defendants restraining them "from further violating the rights and immunities guaranteed to Plaintiffs under the Constitution of the United States of America." (Complaint, p. 9 ¶a). Such an injunction, if issued, would appropriately be directed toward all Defendants, including Defendant Rockefeller. Neither is reinstatement an inappropriate remedy. *McMullan v. Thornburgh*, 508 F.Supp. 1044 (E.D. Pa. 1981) construing *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978). *See also Burns v. Elrod*, 509 F.2d 1133, 1135 (7th Cir. 1975). Therefore, this remaining ground for dismissal must also be denied.

II. Defendants' Motion for Summary Judgment Based on Official Immunity

Defendants Rockefeller, Gilbertson and Miller urge the Court in this motion to award them summary judgment based upon the qualified immunity each possesses as State officials. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). The basis for their argument rests upon the United States Supreme Court's recent holding in *Harlow v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727 (1982), wherein the Court held that "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738.[14] In their motion, Defendants argue that the law governing "patronage termination" is not clearly established, and that, therefore, summary judgment is appropriate. Specifically, Defendants claim that *Elrod* and *Branti* preclude relief unless political affiliation can be shown the "sole cause" of Plaintiffs' terminations, and that "sole cause"

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[14]The *Harlow* Court expressed no view upon the effect of a defendant's immunity defense in an action for injunctive or declaratory relief. *Id.* at 2739, n. 34.

has been accorded such varying interpretations in subsequent decisions that this Court must determine the constitutional rights at issue not "clearly established" for the purposes of evaluating the propriety of summary judgment under *Harlow*. Under this theory, Defendants argue that, given the necessity for a reduction in force which existed in fiscal year 1981, even if Defendants terminated Plaintiffs because of their affiliation with the democratic party, the law which purports to preclude this action was not so "clearly established" as to warrant continuation of this action against them. Thus Defendants contend they could not have been expected to realize that, even if an independent reason for terminating *some person* existed, they would not be free to select exclusively Democrats for that purpose, since those firings could have not resulted "solel[illegible] from political considerations. The Court cannot agree with this analysis.

Plaintiffs' constitutional right to freedom from termination based upon political affiliation or association has been "clearly established" since the Supreme Court's 1976 decision in *Elrod*. The same constitutional principle was subsequently reaffirmed in *Branti*, prior to Plaintiffs' terminations.[15] This case does not present the type of situation involved in *Procunier v. Navarette*, 434 U.S. 555 (1978) where defendants were held not liable for failure to foresee the establishment of a constitutional right prior to its enunciation. Here, Defendants admit to actual knowledge of the ban on politically motivated terminations established in *Elrod*.

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[15]The Supreme Court's subsequent decision in *Branti* did revise the standard for determining which public employees were protected under *Elrod*; however, that revision concerned whether a plaintiff need establish his status as a "non-policy making, non-confidential" public employee. Defendants' argument is not directed toward this issue, but rather toward the role which political considerations may properly play in the decision to terminate an employee.

The test which governs the determination of whether a plaintiff's First and Fourteenth Amendment rights have been infringed by reason of a "political firing" is as clearly established as the right. This Court's decision in *Miller v. Board of Education of County of Lincoln, supra*, decided in 1978, applied the standard set forth in *Mt. Healthy City Board of Education v. Doyle, supra*, a test which has uniformly applied to patronage dismissal actions since that time. *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980) *cert. denied* 451 U.S. 907 (1981); *Wren v. Jones*, 635 F.2d 1277 (7th Cir. 1981) *cert. denied* 454 U.S. 832 (1981); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) *cert. denied* 102 S.Ct. 1719 (1982); *Barrett v. Thomas*, 649 F.2d 1193 (5th cir. 1981) *cert. denied* 102 S.Ct. 1769 (1982); *McMullan v. Thornburgh, supra; Farkas v. Thornburgh*, 493 F.Supp. 1168 (E.D. Pa. 1980) *affirmed mem.* 633 F.2d 209 (3d Cir. 1980) *affirmed mem. sub nom appeal of Farkas* 642 F.2d 441 (3d Cir. 1981); *Visser v. Magnarelli*, 530 F.Supp. 1165 (N.D. N.Y. 1982); *Abraham v. Pekarski*, 537 F.Supp. 859 (E.D. Pa. 1982).[16]

The *Mt. Healthy* test, reaffirmed in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), provides that, once plaintiff has satisfied his *prima facie* burden of demonstrating (1) that his conduct was constitutionally protected, and (2) that his conduct was a "substantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the protected conduct, i.e., that plaintiff's political affiliation was not the "sole cause" of this termination. There is no inconsistency between "sole cause" and the *Mt. Healthy/Givhan* standard which might reasonably be viewed as the basis for misconception of the scope of *Elrod* and the public

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[16]Although *Sands v. Starke County Board of Commissioners*, 530 F.Supp. 712 (N.D. Ind. 1982) did not cite the *Mt. Healthy* test in its decision, it did rely upon the opinion in *Wren v. Jones, supra*, which did apply *Mt. Healthy*.

employees' first amendment rights. If the sole cause of Plaintiffs' terminations was a reason other than political affiliation, Defendants shoulder the burden of proof of that reason once Plaintiffs have established a *prima facie* case. The Court holds that Plaintiffs' constitutional rights were "clearly established" at the time of their terminations,[17] and thus that Defendants are not entitled to summary judgment on that ground.

Under *Harlow*, the ruling just stated completes this Court's analysis of Defendants' immunity defense for purposes of the instant motion. "On summary judgment, the judge appropriately [must] determine . . . whether the law was clearly established at the time an action occurred . . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." 102 S.Ct. at 2739.

The sole remaining ground relied upon by Defendants addresses itself to the merits of the case. Defendants argue, relying upon voluminous affidavits and exhibits, that their good faith has been conclusively established, and that the Court may find as a matter of law that they are, therefore, entitled to judgment. Plaintiffs' response, however, sets forth allegations which, if assumed to be true for the purposes of this motion, create genuine issues of material fact

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[17]The Court is further of the opinion that, in view of the expansive holdings in *Elrod* and *Branti*, Defendants reasonably could not have permitted political considerations to play a part in the decision to terminate Plaintiffs *even if* the meaning of "sole cause" was not clearly established. Those decisions plainly prohibit conditioning public employment upon political affiliation. If in fact Defendants chose to interpret those decisions as permitting them to select for discharge only those of the opposing political party where a legitimate basis for discharging *someone* existed, they did so at their own risk. The Court cannot hold that a reasonable government official would have made such a determination in light of *Elrod* and *Branti*. For this Court to award Defendants summary judgment on the proffered basis would strip public employees of the protection afforded by the *Elrod* and *Branti* holdings.

precluding summary judgment.[18] *See Scheuer v. Rhodes, supra,* at 249-250.

Accordingly, in view of the foregoing, the Court hereby ORDERS:

1. The motion of Defendants Gum, Gilbertson and Miller for judgment on the pleadings is denied as moot;

2. The motion of Defendant Rockefeller for judgment on the pleadings is denied as moot;

3. The motion of Defendants Gum, Gilbertson and Miller for continuance and consolidation with trial on the merits is denied as moot;

4. The motion of Defendant Rockefeller for continuance and for consolidation with trial on the merits is denied as moot;

5. The motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment is denied as moot;

6. The motion of Defendants Gum, Gilbertson and Miller to dismiss Plaintiff Drexelene Perrine is granted;

7. The motion of Defendant Rockefeller to dismiss Plaintiff Drexelene Perrine is granted;

8. The motion of Defendants Gilbertson and Miller for judgment on the pleadings and for summary judgment is denied;

9. The motion of Defendant Rockefeller to dismiss the amended complaint is denied;

10. The motion of Defendants Gilbertson and Miller for summary judgment based on official immunity is denied;

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[18]Defendants have challenged Plaintiffs' response by moving to strike the supporting affidavit of Plaintiffs' counsel submitted therewith. However, since this Court found it unnecessary to base its ruling upon the affidavit, the motion will be denied.

11. The motion of Defendant Rockefeller for summary judgment based on official immunity is denied; and

12. The motion of Defendant Rockefeller to strike the affidavit of Plaintiffs' counsel is denied.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: 7/21/83

Charles H. Haden II, Chief Judge

A TRUE COPY, Certified this

JUL 22 1983

RONALD D. LAWSON, CLERK

BY Susan Whaley DEPUTY

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
APR 5 1984
U. S. Court of Appeals
Fourth Circuit

No. 83-1790

John M. Bever, et al,

Appellees,

versus

Walter Gilbertson and
Charles L. Miller,

Appellants,

and John Gum, et al,

Defendants.

No. 83-1791

John M. Bever, et al,

Appellees,

versus

John D. Rockefeller, IV,

Appellant,

and

John Gum, et al,

Defendants.

ORDER

The appellants' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll there was an equal division of the participating judges in regular active service. Judges Russell, Widener, Hall and Chapman voted in favor of en banc rehearing while Judges Winter, Phillips, Murnaghan and Ervin voted against it. Judge Sprouse disqualified himself.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied. Entered at the direction of Judge Haynsworth for a panel consisting of Judge Winter, Judge Hall, and Judge Haynsworth.

For the Court,

WILLIAM K. SLATE, II

CLERK

APPENDIX D

39a

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

FILED
APR 17 1984
IN CLERK'S OFFICE U.S.
COURT SO. DIST. of W.
Ronald D. Lawson, Cl.

No. 83-1791

Jonn M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexelene Perrine, Francis D. Radcliff,
Robert W. Robinson, Michael Shepherd,
Larry Williams, Larry W. Griffin,

Appellees

v.

John D. Rockefeller, IV, 82-2506 Appellant

and

John Gum, Walter Gilbertson,
Wilton Williams, Charles L. Miller,
individually and as Commissioner
of the West Virginia Department of Highways,

Defendants.

Appeal from the United States District Court for the ..... *District of* South Carolina.

This cause came on to be heard on the record from the United States District Court for the ..... *District of* South Carolina

On consideration whereof, It is now here ordered and adjudged by this Court that a certificate of probable cause to appeal is denied, and the appeal is hereby, dismissed.

FILED
JAN 11 1984
U.S. COURT OF APPEALS
FOURTH CIRCUIT

ENTERED
APR 1 ... 1984
ORDER BOOK
NO. 109 PAGE 221

William K. Slate II
CLERK

A TRUE COPY, Certified this
11th day of May 19 84
RONALD D. LAWSON, CLERK
BY Ronald D. Lawson
DEPUTY

... Sue Ellen Southard

APPENDIX E

AMENDMENTS TO THE CONSTITUTION[9]

[AMENDMENT I]

[*Freedom of Religion, of Speech, and of the Press*]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[AMENDMENT IX]

[*Reservation of Rights of the People*]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[AMENDMENT XIV]

Section 1.

[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the

District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub. L. 97-164, Title I, § 124, 96 Stat. 36.)

Ch. 21 **CIVIL RIGHTS** **42 § 1983**

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Ch. 21 **CIVIL RIGHTS** **42 § 1985**

§ 1985. Conspiracy to interfere with civil rights

Depriving persons of right or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons

within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

§ 17-2A-4. Selection, organization, classification, etc., of personnel; business manager and chief engineer assistants; employees' bonds.

The commissioner shall be in charge of and responsible for the selection, employment and effective organization of all commission personnel for the entire state road and highway program. He may establish such divisions, sections and other functional and organizational units within the commission as may be necessary and practical in the full and effective discharge of the duties and responsibilities of his office. Except as otherwise provided by law, all commission personnel shall be classified pursuant to the job classification system and shall be paid pursuant to the salary scale established by the commissioner.

The commissioner shall select and employ a business manager assistant and one or more chief engineer assistants who shall be registered professional engineers, and

shall establish such other offices, activities, divisions, sections and organizational units as may be necessary and practical. The business manager assistant shall be in charge of and responsible for matters of finance and such other functions as may be assigned to him from time to time by the commissioner. The chief engineer assistant or, if the commissioner has selected and employed more than one chief engineer assistant, the chief engineer assistants shall be in charge of and responsible for planning, equipment, materials, construction, maintenance, and such other functions as may be designated by the commissioner as well as such other functions as may from time to time be assigned to such chief engineer assistant or assistants by the commissioner.

The commissioner shall require every employee who collects fees or handles funds or who has custody or control of equipment or supplies belonging to the State to give bond, with such sureties and in such penal sum as may be approved by the commissioner, for the faithful discharge of each such employee's duties and his accounting for all such fees, funds, equipment and supplies coming into his hands or under his custody or control. All such bonds, when approved by the commissioner, shall be filed in the office of the secretary of state. Premiums on all such bonds shall be paid from commission funds. (1957, c. 143; 1973, c. 116.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

AT CHARLESTON

JOHN M. BEVER, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 82-2506

JOHN GUM, et al.,

Defendants.

AFFIDAVIT OF GOVERNOR ROCKEFELLER

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

JOHN D. ROCKEFELLER IV, being first duly sworn, deposes and says as follows:

1. He is Governor of the State of West Virginia and one of the defendants in this case. He was first elected Governor in the general election of November, 1976, was inaugurated January 17, 1977, and was elected to a second term in the general election of November, 1980.

2. As Governor, he does not normally participate or attempt to participate in the employment decisions of individual State agencies, including the Department of Highways, for the reason that such decisions are considered to be within the jurisdiction and authority of the respective heads of the State agencies. The Governor's only involvement in such employment decisions is in terms of setting the tone and policy of his administration with regard to employment practices, as reflected by the following acts:

a. During the Governor's first term in office and in fact beginning early in 1977, the Governor's staff, at his direction, instructed executive department heads

concerning the Supreme Court decision of *Elrod v. Burns* and the constitutional prohibition against depriving public employees in non-policymaking positions of their jobs on the basis of political affiliation; and

b. In November of 1978, the Governor promulgated Executive Order No. 16-78, which, among other things, instructed all executive agencies that the policy of the State of West Virginia was and is opposed to discrimination in employment on the basis of race, color, sex, national origin, handicap, age, religion or political affiliation. A copy of this Executive Order is attached hereto and made a part hereof as "Exhibit A."

3. The Governor does not know the plaintiffs in this case, had no personal involvement in the decision to terminate these plaintiffs from employment with the Department of Highways, has no knowledge that any of these plaintiffs were in fact terminated from such employment on the basis of their political affiliations or beliefs, and has no knowledge concerning their terminations other than as acquired in connecton with this litigation and as set forth in this Affidavit.

4. The Governor did not participate in and has no knowledge concerning any unlawful conspiracy, scheme or plan to deprive these plaintiffs of their employment with the Department of Highways or to deprive any person of his or her employment with the Department of Highways based on political affiliation.

5. In January 1980, the Governor, in performing his constitutional mandate to provide revenue estimates with respect to budget proposals made to the Legislature for fiscal year 1981 (July 1, 1980 through June 30, 1981), estimated that State Road Fund revenues from taxes and fees (Gasoline, Motor Vehicle and Privilege Taxes and Fees) for fiscal year 1981 would be in the sum of $228.5 million. These estimates were made by the Governor and

submitted to the Legislature on the basis of information provided him by the Commissioner of Finance and Administration. However, due to a worsening economy, actual revenues received by the Road Fund in fiscal year 1981 from these taxes and fees totaled only $191.6 million, a shortfall of $36.9 million.

6. The Governor is advised and believes that these plaintiffs' positions with the Department of Highways were eliminated in the first half of 1981 as part of a substantial reduction in the workforce of the Department of Highways. This reduction in the Department of Highways workforce was a consequence of a series of events and circumstances and of decisions relating thereto which were made by Commissioner Charles L. Miller in consultation with the Governor and his staff. This decision-making process is described as follows:

a. In late 1980 and early 1981, the Governor and his staff were advised by Commissioner Miller of severe fiscal and budgetary constraints in the Department of Highways. These budgetary constraints resulted from a combination of causes, including (1) the aforesaid failure of Road Fund revenues to meet estimates, (2) reductions in highway funds available from the federal government, and (3) insufficient legislative appropriations to the Department of Highways;

b. Various alternative procedures for coping with these problems, including reductions in the number of Department of Highways personnel, were proposed, considered and evaluated by the Department of Highways and the Governor's Office. These alternatives, including the need for and timing of reductions in Department of Highways personnel, were documented by Commissioner Miller in a series of memoranda to the Governor and his staff, which are attached hereto and made a part hereof as follows:

(1) "Exhibit B-1": Memorandum of November 17, 1980 - Commissioner Miller to Governor Rockefeller;

(2) "Exhibit B-2": Memorandum of November 19, 1980 - Commissioner Miller to Governor Rockefeller;

(3) "Exhibit B-3": Memorandum of December 18, 1980 - Commissioner Miller to Governor Rockefeller;

(4) "Exhibit B-4": Memorandum of January 7, 1981 - Commissioner Miller to Governor Rockefeller;

(5) "Exhibit B-5": Memorandum of January 14, 1981 - Commissioner Miller to Governor Rockefeller;

(6) "Exhibit B-6": Memorandum of January 15, 1981 - Commissioner Miller to Governor Rockefeller;

(7) "Exhibit B-7": Memorandum of March 16, 1981 - Commissioner Miller to Executive Assistant Nick Lazaris;

(8) "Exhibit B-8": Memorandum of March 18, 1981 - Commissioner Miller to Mr. Lazaris;

(9) "Exhibit B-9": Memorandum of May 26, 1981 - Commissioner Miller to Mr. Lazaris;

(10) "Exhibit B-10": Memorandum of June 9, 1981 - Commissioner Miller to Governor Rockefeller; and

c. Based on the information available to him in late 1980 and early 1981 concerning the fiscal constraints confronting the Department of Highways, the supplemental appropriations provided by the Legislature to the Department of Highways for fiscal year 1981,

and the appropriations provided to the Department of Highways by the Legislature for fiscal year 1982 (July 1, 1981 through June 30, 1982), the Governor believed and believes, given the available financial resources, that reductions in Department of Highways personnel were necessary and essential to the fulfillment of his statutory and constitutional obligations as Governor to maintain the fiscal integrity of the State, and to the continuation of a viable road maintenance and construction program in the State of West Virginia.

7. At no time in connection with the decision to reduce the Department of Highways workforce in 1981 did the Governor consider, suggest, authorize, or otherwise intend that such reduction be accomplished because of or based on the political affiliation or beliefs of any Department of Highways employee.

8. At no time in connection with the implementation of the reduction of the Department of Highways workforce in 1981 did the Governor authorize or appoint Wilton Williams or any Democratic party official to act as his agent in connection with any decision to terminate the plaintiffs in this case.

9. At no time during the period in which these reductions in the Department of Highways workforce were implemented in 1981 was the Governor advised of or did he have knowledge of any effort or attempt to implement such reduction in the Department of Highways workforce through a pattern or practice of political discrimination.

10. All actions taken by the undersigned as Governor and by the Governor's Office with respect to these 1981 layoffs were taken in good faith, were based solely upon fiscal and budgetary constraints impacting upon West

Virginia and the Department of Highways, and were wholly unrelated to political considerations.

And further affiant saith not.

JOHN D. ROCKEFELLER IV

Taken, sworn and subscribed before me this 20th day of May, 1983.

My commission expires Feb. 6, 1989.

NOTARY PUBLIC

STATE OF WEST VIRGINIA
EXECUTIVE DEPARTMENT
CHARLESTON

EXECUTIVE ORDER NO. 16-78

By the Governor

WHEREAS, it is the policy of the State of West Virginia to afford equal opportunity in all aspects of employment regardless of race, color, religion, national origin, political affiliation, handicap, sex or age; and

WHEREAS, it is the firm policy of this administration to provide leadership and to encourage by positive measures equal employment opportunity for all qualified persons seeking employment with the State of West Virginia; and

WHEREAS, a positive Equal Employment Opportunity Program is in the best interest of our citizens by making full use of their talents and capabilities; and

NOW, THEREFORE, I, John D. Rockefeller IV, Governor of West Virginia, by virtue of the authority vested in me by the Constitution and the statutes of West Virginia, do hereby issue the following order:

"EXHIBIT A"

ARTICLE I

a. All state agencies under my jurisdiction shall develop an Equal Employment Opportunity Program. Such a program shall be in writing and shall entail positive and aggressive measures to be taken for protected classes in the area of recruitment, hiring, training and other personnel matters.

b. Each Equal Employment Opportunity Program shall contain specific goals and timetables for implementing courses of action to achieve the necessary results.

c. The head of each agency will insure that the intent and spirit of this Executive Order is carried out by all managers, supervisors and employees.

ARTICLE II

a. There shall continue to be a State Affirmative Action Officer appointed by the Governor. The State Affirmative Action Officer shall periodically review and evaluate the Equal Employment Opportunity Program within each agency of state government, and shall require progress reports as he deems necessary. Any program determined inadequate by the State Affirmative Action Officer shall be redrawn in order to attain positive measures for compliance. The State Affirmative Action Officer shall consult with and solicit the recommendations of interested individuals and organizations.

b. The State Affirmative Action Officer shall identify problem areas by agency or other organizational units and make recommendations for correction.

c. The State Affirmative Action Officer shall monitor records of personnel actions such as applicant flow, referrals, hiring rate, placements, transfers, pro-

motions, terminations and other pertinent statistical data to insure that this Executive Order is being implemented.

d. The Affirmative Action Officer shall develop a recruitment program to identify minorities, women, handicapped and other groups who qualify or can become qualified for state employment.

e. The State Affirmative Action Officer shall submit reports to the Governor concerning the progress and problems encountered in state government as it pertains to Equal Employment Opportunity.

f. The State Affirmative Action Officer shall work in cooperation with state agencies, departments and other organizational units to insure compliance with the Executive Order.

g. The State Affirmative Action Officer shall have access to all data, records and reports that are required for the execution of the position's responsibilities.

h. If a state agency fails to comply with this Executive Order or applicable laws for Equal Employment Opportunity, the State Affirmative Action Officer shall discuss this with the Governor.

ARTICLE III

In performing their service to the public, the agencies and individual officers and employees of the state shall not discriminate because of political or religious opinion or affiliation, marital status, race, color, sex, creed, age, national origin or physical handicap, nor shall they authorize the use of state facilities in furtherance of discriminatory practices, or by any other policies on the basis of these factors.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.

[West Virginia State Seal]

DONE at the Capitol, City of Charleston, State of West Virginia, this the 4 day of November, in the year of Our Lord, One Thousand Nine Hundred Seventy-eight and in the One Hundred Sixteenth year of the State.

BY THE GOVERNOR

SECRETARY OF STATE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

AT CHARLESTON

JOHN M. BEVER, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 82-2506

JOHN GUM, et al.,

Defendants.

AFFIDAVIT OF CHARLES L. MILLER

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

CHARLES L. MILLER, being first duly sworn, deposes and says as follows:

1. Affiant is Commissioner of Highways of the State of West Virginia, having been appointed to that position in September of 1977 by Governor Rockefeller. He has served continuously as Commissioner of Highways since that time.

2. Prior to being appointed Commissioner, affiant was Chief Engineer of Operations for the Department. Commissioner Miller has been employed in the Department of Highways in various capacities since 1954, and was District Engineer of District Two from 1974 to 1977. He received a B.S. degree in Civil Engineering from West Virginia University in 1961.

3. Throughout his employment with the Department of Highways, he has engaged in no political activity other than voting.

4. The West Virginia Department of Highways is a statewide agency organized into fifty-five county units and six district units in the field throughout the State, as well as approximately twenty divisions and other top level mana-

gerial and engineering offices in the central headquarters in Charleston.

5. During 1979, the Department had in excess of 7900 employees assigned to these various units. This level of employment has been steadily reduced since that time, both by attrition and by layoff, to approximately 5813 employees at the end of fiscal year 1981, to 5476 employees at the end of fiscal year 1982, and to 5274 employees at present. This represents a total reduction in the work force of the Department of Highways of over 2600 employees since 1979.

6. In late 1980, severe fiscal and budgetary constraints were imposed upon the Department of Highways resulting from a combination of occurrences, including (a) the failure of Road Fund revenues to meet estimates, (b) reductions in highway funds available from the federal government, and (c) insufficient legislative appropriations to the Department.

7. In early 1981, because of these serious fiscal and budgetary constraints, cost reduction measures in the form of personnel cutbacks were effected in the Department of Highways in a series of three layoffs. In these layoffs a total of approximately 1531 employee positions were eliminated. These layoffs occurred as follows:

a. Approximately 185 employees on February 6, 1981;

b. Approximately 496 employees on February 27, 1981; and

c. Approximately 850 employees on June 30, 1981.

In addition to these layoffs, a total of 142 CETA positions were eliminated on April 1 and July 28, 1981.

8. In January 1980, the Governor, in his revenue estimates for fiscal year 1981, estimated that the State Road Fund would generate revenues from taxes and fees (Gasoline, Motor Vehicle and Privilege Taxes and Fees) in fiscal year 1981 in the sum of $228.5 million. However, actual revenues received failed to comport with these estimates,

with Road Fund receipts from these taxes and fees for fiscal year 1981 being in the sum of approximately $191.6 million, $36.9 million less than the estimate made eighteen months earlier.

9. The reasons for the cost reduction step in the form of the February 6, 1981 layoff were outlined by Commissioner Miller in a memorandum of December 18, 1980 entitled "Cost Reduction Proposal: Contract Administration Programs" directed to Governor Rockefeller. A copy of this Memorandum is attached hereto and made a part hereof as "Miller Affidavit Exhibit A."

10. In an attempt to alleviate the budgetary problems of the Department in late 1980 and early 1981 and to forestall the necessity of further reductions in personnel, relief was sought from the Legislature in the form of a supplemental appropriation for fiscal year 1981. Although the Governor requested a supplemental appropriation in the sum of $31.5 million, the Legislature appropriated $26.5 million only. Confronted with the fact of this reduced supplemental appropriation and the necessity for further cost reductions, the second layoff of February 27, 1981 was effected.

11. The fiscal year 1982 budget request made by Governor Rockefeller included a transfer of $81.65 million to the Department of Highways from the General Revenue and Revenue Sharing Funds. However, legislative appropriations from the General Revenue and Revenue Sharing Funds to the Department for fiscal year 1982 totaled only $48.5 million. Because of the substantial reduction in the amount of funds appropriated for transfer from General Revenue and Revenue Sharing Funds for fiscal year 1982, further cost reduction measures were required, including the layoff of additional personnel on June 30, 1981.

12. All actions taken by the affiant as Commissioner with respect to these 1981 layoffs were taken in good faith, were based solely upon fiscal and budgetary constraints impacting upon West Virginia and the Department of

Highways, and were wholly unrelated to political considerations.

13. At no time in connection with the decision to reduce the Department of Highway's work force in 1981 did Commissioner Miller consider, suggest, authorize or otherwise intend that such reduction be accomplished because of or based on the political affiliation or beliefs of any Department of Highways' employee.

14. At no time in connection with the 1981 reduction in force of the Department of Highways personnel was Commissioner Miller instructed or advised by Governor Rockefeller or any member of the Governor's staff, to effectuate such reduction based upon an employee's political affiliation or belief. In fact, Commissioner Miller was instructed not to do so, and was specifically advised by persons on the Governor's staff about the case of *Elrod v. Burns*.

15. Commissioner Miller had no personal involvement whatsoever in the decision to terminate these specific plaintiffs, and has no knowledge concerning the decisions to terminate these plaintiffs other than as acquired in connection with this litigation and as set forth in this Affidavit.

16. Commissioner Miller did not participate in and has no knowledge concerning any unlawful conspiracy, scheme or plan to deprive these plaintiffs of their employment with the Department of Highways or to deprive any person of his or her employment with the Department of Highways based on political affiliation.

And further affiant saith not.

Charles L. Miller
CHARLES L. MILLER

Taken, subscribed and sworn to before me this 13th day of June, 1983.

My commission expires September 22, 1991.

Janet L. Riley
NOTARY PUBLIC

-5-

84-25

Office - Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2139

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

APPENDIX

TIMOTHY N. BARBER
12 Capitol Street
Charleston, WV 25301
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Counsel for Respondents

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin, Appellees,

versus

Walter Gilbertson and
Charles L. Miller, Appellants,

and

John Gum, Wilton Williams,
individually and as
Commissioner of the West Virginia
Department of Highways; and
John D. Rockefeller, IV,
individually and as Governor of
the State of West Virginia, Defendants.

No. 83-1791

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin, Appellees,

versus

John D. Rockefeller, IV., Appellant,

and

John Gum, Walter Gilbertson,
Wilton Williams, Charles L. Miller,
individually and as Commissioner
of the West Virginia Department
of Highways, Defendants.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston, Charles H. Haden, II, District Judge, 82-2506

Argued October 5, 1983
Decided January 11, 1984

Before WINTER, Chief Judge, HALL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge

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Robert B. King (Rebecca A. Betts, King, Betts & Allen on brief) for Appellant John D. Rockefeller, IV; David P. Cleek, Deputy Attorney General (Chauncey H. Browning, Attorney General; Edward W. Eardley, Steptoe & Johnson on brief) for Appellants Charles L. Miller and Walter L. Gilbertson; Timothy N. Barber (Guy R. Bucci on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

In 1981, West Virginia's Department of Highways allegedly was confronted with the need to substantially cut its expenditures. It chose to terminate the employment of a large number of lower echelon employees. According to plaintiffs, the sole or principal criterion for the selection of those to be terminated was political party affiliation. Loyal Democrats were to be retained while Republicans and Independents were to be terminated.

There are now pending in the Northern and Southern Districts of West Virginia a number of cases brought by terminated employees of the Department of Highways alleging that their terminations were in violation of their constitutional rights of free association. The plaintiffs in this case are such

terminated employees who worked under the supervision of John Gum, County Supervisor for the Department of Highways in Doddridge County. The defendants are Governor John D. Rockefeller, IV, Charles L. Miller, Commissioner of West Virginia's Department of Highways, Walter Gilbertson, District Engineer of District 4 of the Department of Highways, Gum and Wilton Williams, Chairman of Doddridge County Democratic Executive Committee. The amended complaint sought injunctive relief, including reinstatement of the plaintiffs to their former jobs, and damages. Governor Rockefeller, Commissioner Miller and District Engineer Gilbertson were sued both in their official and individual capacities, and they claim qualified immunity from the claim of damages against them personally. The immunity claim was the basis of a motion for summary judgment. The motion

was denied by the district judge largely on the basis that those defendants could not reasonably have believed that a political criterion for the selection of those employees whose employment was to be terminated was permissable under the Constitution of the United States.

Those three defendants sought a certificate by the district judge for a permissable interlocutory appeal under 28 U.S.C.A. § 1292(b). The district judge refused such certificaation, whereupon those three defendants filed notices of appeal under 28 U.S.C.A. § 1291. The question now before us, upon a motion to dismiss the appeals, is whether these appeals are within the collateral order exception to the general rule that appeals of right are allowable only from final judgments.

I.

As developed in Cohen v. Beneficial

Loan Corp., 337 U.S. 541, and subsequent cases in the Supreme Court, an appeal from an interlocutory order under § 1291 may be taken, if the interlocutory order conclusively determines the question in the trial court, resolves an important question independent of the subject matter of the litigation, is effectively unreviewable on appeal from a final judgment or so important that review should not wait upon final judgment, and presents a serious and unsettled question upon appeal.

In Cohen itself, the plaintiffs were small shareholders who brought a derivative stockholders' action within the diversity jurisdiction of the federal courts. The defendants, faced with the prospect of large litigation expenses, sought an order compelling the plaintiffs to post security for them under a state statute which required the plaintiffs to

reimburse the defendants for such expenses in the event that the defendants prevailed. The district court denied the motion to compel the posting of such security.

It is obvious that in Cohen, if an immediate appeal was not available and the case proceeded to final judgment, the defendants would have lost irretrievably the security they sought to gain by the motion, and the purpose of the statute imposing the burden of costs upon the losing plaintiffs would have been substantially frustrated.

Orders denying claims of absolute immunity have been held within the Cohen collateral order exception. In Helstoski v. Meanor, 442 U.S. 500 (1979), the claim was one of immunity under the Speech and Debate Clause. In Abney v. United States, 431 U.S. 651 (1977), the claim was one of immunity under the Double

Jeopardy Clause, while in Nixon v. Fitzgerald, 457 U.S. 731 (1982), the claim was one of absolute immunity for the President of the United States.

Claims of absolute official immunity are rightfully classified with claims of immunity under the Double Jeopardy Clause and the Speech and Debate Clause. In each instance, an important aspect of the absolute immunity with which the person is clothed is that he not be put to trial at all, and the right not to be put to trial at all is irrevocably lost if an order putting such person to trial may not be reviewed until after final judgment.

The qualified immunity, with which the three appellants are cloaked, is of a lower order. It provides substantial protection for a public official who acts under circumstances in which a reasonable person would believe that his conduct did

not violate established constitutional rights of another. That such a defendant not be put to the trouble of defending himself on the merits is also an aspect of immunity. Indeed, in Harlow v. Fitzgerald, 457 U.S. 800, the Supreme Court sought to give additional protection against being put to trial on insubstantial claims to persons possessing qualified immunity. It eliminated the subjective aspect of the qualified immunity doctrine as theretofore understood so that more claims of qualified immunity could be resolved on motions for summary judgment before trial.

It is far from clear, however, that an order denying a claim of qualified immunity is within the collateral order exception. While the Supreme Court in Harlow v. Fitzgerald considered the contours of qualified immunity, the case

got there because the order in the district court denied Harlow's claim of absolute immunity. See, note 11, 457 U.S. at 806. In McSurely v. McClellan, 697 F. 2d 309 (D.C. Cir. 1982), the court held that an order denying a claim of qualified immunity was within the collateral order exception, a position with which a panel of this court (Judges Hall, Murnaghan, and Haynsworth) differed in an unpublished opinion in Benford v. American Broadcasting Companies, Inc., (No. 83-1168, 1983).

Whatever the situation might be in other circumstances, however, the qualified immunity claimed by these three appellants cannot prevent their being put to trial. The plaintiffs seek equitable relief as well as money damages, and the appellants have no immunity from being

put to trial on the equitable claims.[1] They are the principal defenders of the state's position. They will bear a major responsibility for the outcome of the

---

1. Our dissenting brother suggests that Governor Rockefeller and District Engineer Gilbertson were not proper parties to this action insofar as injunctive relief is sought. If reinstatement were the only equitable remedy sought, complete relief might be obtainable if Highway Commissioner Miller, or his successor, was the only named defendant, but the plaintiffs also seek an injunction prohibiting all defendants from conspiring to violate plaintiffs' constitutional right to be free of discrimination in employment based entirely upon political party considerations. Commissioner Miller serves "at the will and pleasure of the Governor" W.Va. Code 6-7-2A, and is vulnerable to pressure from the Governor. Commissioner Miller is responsible for "the selection, employment, and effective organization of all Commission personnel --" W.Va. Code 17-2A-4. Doubtless it is he who sets broad policy, but he may act only through subordinates, such as District Engineer Gilbertson, who either makes specific personnel decisions within the guidelines set by the Commissioner or who, at least, may make recommendations to the Commissioner. We conclude that Governor Rockefeller and Engineer Gilbertson are proper parties insofar as injunctive relief is sought.

litigation and will be among the principal witnesses at the trial. Whether or not they are immune from an assessment of damages against them in their individual capacities, the litigation will demand their time and attention. A present declaration of immunity from damage claims cannot avoid the diversion of their attention from other official duties which the litigation will occasion.

If the personal pocketbooks of the three appellants are, or may be, at risk, the degree of their distraction from other official duties may be greater than it otherwise would be. Still, one would suppose that, if the risk of personal liability were eliminated, the three, as responsible public officials, would give the litigation all of the thought and attention necessary adequately to protect the interest of the state.

The doctrine of qualified immunity cannot protect a public official from a claim of personal liability. It may provide a means by which the litigation may be terminated sooner than it otherwise might be, and it provides the official with substantive protection against personal liability for official wrongs other then a violation of established constitutional rights. In this case, however, a trial had been scheduled, and, if these appellants had nothing to do with the selection process and bore no responsibility for it, as they claim, they might have obtained a favorable judgment on the claims against them individually sooner by a trial on the merits than by appellate litigation of their immunity claims.

In these circumstances, the question whether a denial of the immunity claims is appealable before trial and final

judgment, would appear to have little effect upon the willingness of responsible persons to serve in public office. That is one of the reasons for the existence of the doctrine of qualified immunity, and a claim of personal liability on the part of a public official should be adjudicated with reasonable promptness. Here, however, trial on the merits is at hand, and the appellants can look forward to prompt vindication of their positions if they are correct in their claims that they were not participants in the selection process and were not otherwise responsible for it.

If the question of qualified immunity is still in the case after final judgment in the district court, it may readily be reviewed in an appeal from that judgment.

Generally, in the Supreme Court the

collateral order exception has been confined to situations in which the claimed right would be lost or deprived of its practical value if immediate review is not provided. This is true in absolute immunity cases in which the defendant is entitled not to be put to trial. Other preliminary orders of great importance to the litigants have been held not within the doctrine. Pretrial discovery orders may not be reviewed before final judgment. Cobbledick v. United States, 309 U.S. 323 (1940), and United States v. Ryan, 402 U.S. 530 (1971). An order denying class certification is not within the doctrine. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). Nor is an order refusing to disqualify counsel. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Litigants may desire early appellate rulings on important orders of

that sort, but the collateral order exception is a narrow one and reserved for rare cases. Such a one was Mercantile National Bank. v. Langdeau, 371 U.S. 555 (1963), where the question was one of venue in protracted litigation against two national banks which asserted a right not to be put to trial at all in the court in which the action had been brought. The question of venue is subject to appellate review after final judgment, but the court was moved by the specter of the great waste that would occur if the extensive litigation were permitted to proceed in the wrong court.

There are no comparable circumstances here. There is no problem of jurisdiction or venue in the district court. The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgment.

In the lower federal courts, orders denying claims of absolute immunity have been held appealable before trial. Chavez v. Singer, 698 F. 2d 420, 421 (10th Cir. 1983); Forsyth v. Kleindienst, 599 F. 2d 1203, 1208-1209 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) (Forsyth I); Forsyth v. Kleindienst, 700 F. 2d 104 (3d Cir. 1983) (Forsyth II. In Forsyth I, an interlocutory appeal from an order denying a claim of qualified immunity was not allowed, and the court said it was not even seriously contended that those orders met the Cohen requirements. In Forsyth II, the majority expressed skepticism about the appealability of the denial of summary judgment on the claim of qualified immunity referring to the Supreme Court's decision in Harlow v. Fitzgerald and the decision of the United States Court of Appeals for the District of Columbia

Circuit, mentioned above, in McSurely v. McClellan. By eliminating the subjective component of the qualified immunity claim, the Supreme Court clearly intended to facilitate disposition of claims of qualified immunity on summary judgment motions, but one must read much into that opinion to conclude that the Supreme Court also intended that denials of such motions should be immediately appealable. If, however, it may ultimately be determined that such an order is immediately appealable if the effect of the immunity claim would be to terminate the litigation insofar as the immune defendant is concerned, this case is different. Partial summary judgment for these appellants on the damages claims against them individually would not terminate the litigation nor avoid the necessity for a trial and active participation in it by these appellants.

Under these circumstances, we cannot read Harlow v. Fitzgerald as a basis for a conclusion that this denial of summary judgment meets the Cohen requirements.

II.

There is another reason for dismissal of this appeal as premature.

One of the requirements for immediate appealability of a collateral order under the Cohen doctrine is that it presents a serious and unsettled question of law. A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that.

In 1981, when these plaintiffs were terminated as employees of the Department of Highways, their constitutional right

not to be discharged solely because of their political affiliation was clearly established. Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). The plaintiffs were not confidential employees nor policy makers. Indeed, there is no contention here that they are not the kind of employees who enjoy the protection of the Elrod-Branti principle.

Instead, the defendants contend that their discharge was not solely because of the lack of affiliation with the Democratic Party. It was for economic reasons, they say.

We may accept the fact that in 1981 fiscal considerations made a reduction in force in the Department of Highways necessary or appropriate. The decision that a reduction in force is necessary, however, was only a backdrop. It did not identify those employees to be terminated

or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were to be released and would effect their actual terminations. The Elrod-Branti principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force.

It is true that in both Elrod and Branti the patronage system had been operating to procure the discharge of members of an unfavored party to replace them with members of a favored party. Proof that the discharges were solely for political purposes may be facilitated when there are immediate replacements by members of a favored party, but the Constitution protects the rights of existing employees against discharge solely for political reasons. If, in the

implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations. the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle.

The defendants place major reliance on Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), but that case is of no assistance to them. In that case, a court had ordered the reinstatement of a number of Democrats who had been discharged solely for political reasons. The affected departments of the State of Illinois discharged a number of Republicans in order to make room for the Democrats to be reinstated. Considerations of fiscal limitations and

efficiency militated strongly against the employment of both groups. In that case, however, the pool from which the employees to be terminated were selected was composed entirely of Republicans. Republican affiliation was not the criterion of selection, and it was properly concluded that economic necessity was the reason for their termination.

Wren is thus nothing like this case where the allegation is that party affiliation was the sole criterion by which these plaintiffs were selected for discharge. At least so far, this is not a mixed motive case. Economic considerations may have occasioned the reduction in force. They did not dictate, or even address, the political criterion by which those to be discharged allegedly were chosen.

III.

Because this collateral order is not within the Cohen exception to the rule that appeals of right may be taken only from final judgments, the appeal is dismissed.

APPEAL DISMISSED

HALL, Circuit Judge, dissenting:

I cannot accept the majority's dismissal of these appeals as interlocutory. In concluding that pretrial review is unavailable, the majority has ignored both the facts of this case and applicable law. In my view, the district court's order, denying appellant's claims of qualified immunity, is precisely the type of preliminary ruling which necessitates immediate appellate review. For this reason, I must dissent.

I.

This case is one of nine civil actions currently pending against West Virginia's Governor Rockefeller, Department of Highway (DOH) Commissioner Miller, and various DOH District Engineers for their alleged participation in a conspiracy to terminate some sixty former DOH employees for political

reasons. In this case, as in the others, plaintiffs are Republicans and Independents, who seek to hold Governor Rockefeller, a Democrat, and other state officials personally liable for monetary damages. The state defendants deny that they are liable for damages because of their entitlement to qualified or "good faith" immunity.

In the proceedings below Governor Rockefeller, Commissioner Miller, and District Engineer Gilbertson moved for summary judgment based on their official immunity. The parties agree that the matter was ripe for summary disposition and that no facts regarding the immunity claim remain unresolved. According to the uncontradicted evidence neither Governor Rockefeller nor the other two appellants were personally involved in the selection of these nine plaintiffs for termination. Moreover, the record

also clearly establishes that none of the three at any time considered, suggested, authorized, or otherwise intended that the terminations be politically motivated. Finally, as plaintiffs concede, it is clear that the terminations arose as a result of an economically necessitated reduction in force.[1/] Notwithstanding these undisputed facts, the district court denied the motions for summary judgment and these appeals followed.

In my view, the majority erroneously holds that the appeals from the denial of summary judgment must await the outcome

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1/ The record in this case demonstrates that because of the state's fiscal crisis in late 1980, over 1,500 DOH employee positions were eliminated in 1981, the year of plaintiff's terminations. As of now, more than 2,600 DOH employees have lost their jobs since the end of 1980. This represents an elimination of approximately one-third of the DOH workforce as it existed in late 1980.

of the trial. Under 28 U.S.C. § 1291 only appeals from final judgments are ordinarily permitted. Nevertheless, as the majority notes, an exception to this general rule, known as the collateral order doctrine, has been recognized by the Supreme Court in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), and other cases. To fall within the collateral order exception, the order appealed from must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment; and (4) present a serious and unsettled question on appeal. In the companion cases of Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court recognized the applicability of the collateral order

doctrine to both absolute and qualified immunity claims and the need for pre-trial appellate review of the denial of such claims. Other Circuit Courts, applying Harlow, have affirmed the appropriateness and need for immediate review of official immunity claims. Chavez v. Singer, 698 F. 2d 420, 421 (10th Cir. 1983); McSurely v. McClellan, 697 F. 2d 309, 316 (D.C. Cir. 1982); Forsyth v. Kleindienst, 599 F. 2d 1203, 1208-1209 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) (Forsyth I); Forsyth v. Kleindienst, 700 F. 2d 104 (3d Cir. 1983) (Forsyth II). The majority, however, has concluded that Harlow is not controlling and that these appeals do not meet the four criteria of the collateral order exception to 28 U.S.C. § 1291. I disagree. In my opinion, if ever there was a case which justified application of Harlow and the collateral order doctrine,

this is certainly the one.[2/]

II.

Official immunity has long been recognized as a concept essential to the effective functioning of government.

[2/] The majority's reference to the unpublished decision in Benford v. American Broadcasting Companies, Inc., et al., No. 83-1168 (4th Cir., April 11, 1983), in no way deters me from finding Harlow applicable in this instance. The two cases are factually distinct. In Benford, we simply held that an immediate appeal of the district court's order denying summary judgment was not warranted when the qualified immunity defense was not finally determined and where the disappointed movants could still present facts at trial in support of their claim to immunity. In that case, the district court ruled that the Congressional staff defendants had acted beyond the scope of their authority and, therefore, lacked standing to assert a qualified immunity defense; however, in deciding against the Congressional defendants, the district court left open the possibility that they could prove certain facts at trial which would entitle them to qualified immunity. Here, on the other hand, all of the facts pertaining to the qualified immunity defense asserted by Governor Rockefeller and the other state officials have been presented and the district court has conclusively resolved their immunity claims against them.

Butz v. Economou, 438 U.S. 478 (1978). As noted by the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 239 (1974), officials, including a state's chief executive officer and his aides, must be permitted "to perform their official functions free from the threat of suits for personal liability." The Supreme Court in Harlow expressed its frustration with the increasing burdens imposed on public officials in defending against "insubstantial claims" and made clear that suits brought against public officials for alleged constitutional torts should be screened at the earliest stages of litigation:

> In Butz, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U.S., at 507. . . . We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and

> firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. Id., at 508.

457 U.S. at ____, 102 S.Ct. at 2739, n. 35.

Accordingly, the Supreme Court departed from the earlier requirement that in order to be entitled to qualified immunity an official must show both objective and subjective good faith. Under Harlow, it is sufficient for purposes of good faith immunity if the conduct in question did not violate clearly established rights which a reasonable person would have known. In recasting this standard, the Harlow Court noted:

> (I)t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty - at a cost not only to the defendant officials, but to the society as a whole (footnote omitted). These social costs include the expenses of

> litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties." Gregiore v. Biddle, 177 F. 2d 579, 581 (CA 2 1949), cert. denied 339 U.S. 949 (1950).

457 U.S. at ____, 102 S.Ct. at 2736.

As the District of Columbia Circuit held in McSurely, the Supreme Court in Harlow "consciously sought to facilitate summary disposition of insubstantial claims against governmental officials. Consequently, . . . appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trial under qualified immunity on the same basis as for absolute immunity." 697 F. 2d at 316. Similarly, the Third Circuit in

Forsyth II, 700 F. 2d at 105, stated that a claim of absolute immunity". . . protects a right not to be subjected to trial - a right that is lost if appellate review awaits final adjudication. If follows, therefore, that a stay (of the trial) must be granted or the defendant will be deprived of the benefits of adjudication before trial."

The majority, however, rejects the McSurely and Forsyth II analysis. It stresses in Part I of its opinion that, because plaintiffs seek reinstatement to their former jobs as well as damages, appellants must proceed to trial in any event, and, therefore, the denial of immediate appellate review does not result in an irretrievable loss to appellants. This mistaken view ignores

the fact that neither Governor Rockefeller nor District Engineer Gilbertson are proper parties for injunctive relief.[3/] Furthermore, the majority's holding can easily lead to the pernicious practice of tacking on a claim for injunctive relief in order to avoid summary judgment and force officials to go to trial on meritless damages actions. In an appropriate case, the majority's rationale might have merit. It can have no application, however, in a case such as this, where public officials are contesting the right to be haled into Court in their personal capacities[4/] and face trial on what is clearly an insubstantial claim for damages.[5/]

[3/] Under W.Va. Code § 17-2A-4 (1983), only Commissioner Miller has the authority to order reinstatement.

[4/] The majority concludes that it makes no difference whether the personal pocketbooks of appellants are at risk or

(footnotes 4 and 5, continued)
not insofar as their distraction from official duties is concerned. This position, however, completely overlooks the fact that an official being sued personally for money damages may be required to retain private counsel at his own expense. Furthermore, the fear of being sued and held personally liable for damages is a far cry from a suit for reinstatement or injunctive relief, which public officials face regularly in the course of performing their duties. As the Supreme Court noted in Harlow, 457 U.S. at ____, 102 S.Ct. at 2736, 2738, the threat of personal liability could deter all but the most resolute or irresponsible from discharging their public duties, or even from being willing to serve in public office.

5/ A review of the current state of the record quickly reveals the insubstantiality of plaintiffs' claim. Plaintiffs allege that appellants participated in a scheme to oust them from their jobs for political reasons, of that appellants knew, or should have known, that the terminations were illegal and did nothing to prevent them. These allegations, however, when submitted to the test of appellants' motions for summary judgment, are not supported by a single shred of evidence, and the majority cites none.

Appellants' affidavits substantiate their defense that the terminations were due to financial necessity and indicate that none of the appellants had any personal involvement whatsoever in plaintiffs' selection for discharge by another defendant, County Supervisor John

(footnote 5, continued)
Gum. That plaintiffs were discharged solely by Gum, and without consultation, is further supported by Gum's deposition, in which he stated that he alone made the decision to terminate plaintiffs.

None of plaintiffs' submissions, in response to these affidavits and supporting documentation, in any way contradict appellants' evidence. In fact, one of plaintiffs' submissions, a deposition taken of Governor Rockefeller in connection with other litigation, reveals that political hiring and firing was specifically disavowed by the Rockefeller administration. It further demonstrates that 55% of the DOH employees terminated in 1981 were persons hired by Governor Rockefeller's administration, while only 38-39% of those terminated were persons hired by the former Republican administration.

I am thus at a loss to understand the district court's rationale for allowing the damages claim to proceed to trial on the ground that "(p)laintiffs' response . . . sets forth allegations which if assumed to be true for the puroses of this motion preclude summary judgment." Under Fed. R. Civ. P. 56 (e), once a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading." The rule requires the responding party to set forth specific facts showing that there is a genuine issue for trial or else have summary judgment entered against him. The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations. By dismissing these appeals, the majority seems to sanction this unwarranted practice.

motivated at least in part by a fiscal crisis, is open to serious question.

As recognized in Abraham v. Pekarski, 537 F. Supp. 858, 863-64 (E. D. Pa. 1982):

> Few Supreme Court decisions in recent years have generated as much litigation and controversy as have Elrod and Branti. Moreover, because of the lack of a majority opinion in Elrod, a problem not cured by Branti, the sweep of Elrod and Branti has been subject to a good deal of critical analysis seeking to assess their reach (footnotets omitted).[6/]

The decisions of our own Court reflect the continued uncertainty surrounding Elrod's scope and applicability. In Ramey v. Harber, 589

6/ Judge Aldisert of the Third Circuit Court of Appeals made the following observation in his concurring opinion in Loughney v. Hickey, 635 F. 2d 1063, 1069 (3d Cir. 1980): "I suggest that the various majority opinions in both Elrod and Branti are not capable of public comprehension."

F. 2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979), this Court noted the factual distinctions between that case, which involved a newly elected sheriff's failure to rehire deputies who had actively campaigned against him, and the Elrod case. Although the majority found it unnecessary to determine the applicability of Elrod to the Ramey facts, it nonetheless expressed its reservations in this regard: "The district court's decision is supported by the broad sweep of the Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices." 589 F. 2d at 757.[7/]

7/ Other decisions in this Circuit which reflect the continuing uncertainty over the scope of Elrod include: Delong v. United States, 621 F. 2d 618, 625 (4th Cir. 1980) (Dumbauld, J., concurring:

Courts in other Circuits have also wrestled with the meaning of Elrod. In spite of the majority's view that the Seventh Circuit's decision in Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), cert. denied, ____ U.S. ____, 102 S. Ct. 129 (1981), is of no aid to appellants, I find that case instructive. In Wren, the Seventh Circuit was called upon to weigh the fiscal interest of the State against the Elrod rights of public employees in Illinois. In this connection the Wren Court held that "(i)n view of the involuntary requirement that (certain)

(footnote 7, continued)

"appellant's situation does not fall within Elrod. He has not been discharged, or threatened with discharge. He has simple been transferred. . ."') and Johnson v. Bergland, 586 F. 2d 993, 996 (4th Cir. 1978) (Hall, J., dissenting: ". . . the majority's reliance on Elrod v. Burns . . . is misplaced; there the infringement of first amendment rights was direct and immediate, not indirect and speculative.")

plaintiffs be reinstated, and of the fiscal exigencies, . . . the State's interest in maintaining prudent control over the efficient use of their (sic) resources outweighs any minimal impact on the plaintiffs' right to political association." Id. at 1287. (emphasis added).

Whether or not Elrod applies in the instant case, where a substantial portion of the public employment sector had to be permanently eliminated for legitimate financial reasons, is, therefore, by no means clear and settled. Except for economic necessity, all of the plaintiffs would have remained in their DOH jobs in 1981. Thus, the applicability of Elrod to the facts of this case, and the constitutional violations which plaintiffs assert, are highly questionable and at the very least justify pre-trial review by this Court

under the collateral order doctrine.

IV.

The majority's denial of pre-trial review under the circumstances presented in this case flies in the face of Harlow and conflicts with decisions by other Circuit Courts which have allowed immediate review of the denial of official immunity claims. As a result, appellants have had their claims to qualified immunity conclusively resolved against them. They have irretrievably lost whatever claim they may have to official immunity, not only in this case, but possibly in the eight other related cases now pending against Governor Rockefeller, Commissioner Miller, and other District Engineers like Gilbertson. Denying appellate review irreparably harms not only these public officials, but also the public at large and the very concept of official immunity.

For the foregoing reasons, I would hold that we have jurisdiction of these appeals under the collateral order doctrine and would address the immunity claims on their merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

CHARLESTON

JOHN M. BEVER, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 82-2506

JOHN GUM, et al,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon numerous dispositive motions by Defendants Gum, Gilbertson, Miller[1] and Rockefeller. Certain of the motions challenge Plaintiffs' original complaint, which has since been superseded by the amended complaint filed March 28, 1983. Certain other motions have been rendered moot by this Court's continuance of the

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[1] Defendants Gum, Gilbertson and Miller are jointly represented.

injunction hearing previously scheduled for March 7, 1983. One motion is unopposed. Remaining are four dispositive motions post-dating the amended complaint, which are opposed by Plaintiffs. These latter four motions substantially overlap; two were submitted on behalf of Defendant Rockefeller, two were submitted by the Defendants, Gilbertson and Miller. Prior to reviewing the substance of these motions, the Court deems it appropriate to summarize the events of this litigation from its inception to the present time.

Plaintiffs originally brought this action in the Circuit Court of Kanawha County, West Virginia. Subsequently, Defendants filed a petition for removal[2]

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[2] All Defendants were at that time jointly represented by the Attorney General of West Virginia and counsel for the state insurance carrier.

pursuant to 28 U.S.C. § 1441; Plaintiffs responded by moving to remand the case back to Kanawha County. By Order entered November 17, 1982, this Court held that, since the action had been properly removed under the provisions of 28 U.S.C. § 1446, and since federal question jurisdiction existed, the Court had no discretion to remand. Discovery then commenced in anticipation of the March 7, 1983, injunction hearing.

Redress is sought in this action for the alleged deprivations of Plaintiffs' right to free political association and affiliation, which they contend occurred under a system of political patronage in effect within the Department of Highways (DOH), and specifically in Doddridge County, West Virginia. The alleged "political firing" of the ten Plaintiffs, all registered Republicans, was said to have been perpetrated by Defendants under

the democratic administration of West Virginia Governor John D. Rockefeller, IV. Three of the remaining Defendants, John Gum, Walter Gilbertson and Charles L. Miller, were supervisory officials of the DOH during the period in question; Defendant Wilton Williams was democratic committee chairman of Doddridge County, West Virginia, the situs of Plaintiffs' employment.

This action was brought pursuant to the provisions of Title 42, United States Code, Sections 1983 and 1985, and under the authority of Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980). Plaintiffs alleged in their complaint two alternative theories of liability: (1) that all Defendants participated directly in a conspiracy to deprive them of their civil rights; and/or (2) that the Defendants Gilbertson, Miller and Rockefeller

indirectly violated their rights by failing to act when they "knew or should have known" of the alleged unconstitutional conduct.

Defendants answered the complaint, denying unlawful conduct and affirmatively asserting both their official immunity and their good faith in acting as officers of the state.[3] The immunity defense, although not raised by motion prior to the scheduled prehearing conference, was nevertheless considered by this Court in anticipation of the March 7 injunction hearing. The Court determined, and so informed the parties on March 2, 1983, that under the Eleventh Amendment to the United States Constitution and under Edelman v. Jordan, 415 U.S. 651 (1974), Alabama v. Pugh, 438

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[3] Wilton Williams, however, was not a state employee and thus could assert no immunity or good faith defenses.

U.S. 781 (1978), and Quern v. Jordan, 440 U.S. 332 (1979), Plaintiffs were precluded from obtaining injunctive relief in the form of back pay from the state officials in their official capacities.[4] Plaintiffs were then given the option of (a) proceeding against Defendants on March 7 solely to determine their entitlement to prospective injunctive relief, i.e., reinstatement, or (b) of amending their complaint to replace their back pay request with a prayer for money damages in that amount from Defendants as individuals.[5]

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[4] This decision was made prior to the issuance of the West Virginia Supreme Court of Appeals' decision in Martin v. West Virginia Board of Regents, No. 15438 (June 30, 1983).

[5] The complaint as originally filed sought only injunctive relief: That is, retrospective relief in the form of back pay; and prospective relief in the form of reinstatement to their previously held positions.

plaintiffs chose to amend their complaint.

The motions of Defendants Gum, Gilbertson, Miller and Rockefeller in their individual capacities for judgment on the pleadings are based upon the character of the relief requested in Plaintiffs' original complaint. While Defendants as individuals may have been entitled to partial judgment on the pleadings had the complaint not been amended, since the injunctive relief sought was recoverable merely from Defendants as State officials, because the Plaintiffs' claim now seeks money damages from Defendants, Defendants' motions are moot and, therefore, must be denied. See Burt v. Board of Trustees, 521 F. 2d 1201 (4th Cir. 1975); Miller v. Board of Education of Cty. of Lincoln, 450 F. Supp. 106 (S.D. W.Va. 1978).

Those issues revolving around

Plaintiffs' original prayer for relief were, as noted, heard by the Court at a prehearing conference conducted on March 2, 1983. Because Plaintiffs opted at that time to amend the complaint, this Court ordered the March 7, 1983, hearing continued and consolidated with the August 22, 1983, trial on the merits. By doing so, the Court thus rendered moot Defendants' motions for continuance and consolidation.

One other motion pre-dates Plaintiffs' amended complaint, that is, the motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment. The bases for that motion are trifold: First, that the complaint fails to set forth Plaintiffs' allegations with the requisite particularity; second, that the record does not support the charges; and third, that Defendants are entitled to judgment because of their official

qualified immunity. The Court is of the opinion to deny this motion, primarily because the pleading and immunity issues and the discussion of the merits are addressed in subsequent motions post-dating the amended complaint.[6]

Remaining for decision, then, are six dispositive motions which post-date the amended complaint. Two motions filed on behalf of Defendants Gilbertson and Gum parallel two filed by Defendant Rockefeller; each have moved (1) for dismissal of Plaintiff, Drexelene

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[6] The pleading issue is raised in Defendant Rockefeller's motion to dismiss the amended complaint and the motion of Defendants Gilbertson and Gum for judgment on the pleadings and for summary judgment; the immunity issue is addressed in the subsequent motions by Defendants Gilbertson, Miller and Rockefeller for summary judgment based upon official immunity. That portion of Defendant Rockefeller's motion which is concerned with the merits is considered infra together with Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment.

Perrine, and (2) for summary judgment based upon official immunity. In addition, Defendant Rockefeller has, as noted, moved for dismissal of the amended complaint, a motion which presents essentially the same allegations as Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment. The motion for dismissal of Plaintiff Perrine is unopposed by Plaintiffs, and, therefore, may be granted without further discussion. The balance of the dispositive motions, are, however, opposed by Plaintiffs and memoranda in response thereto, supplemented by Plaintiffs' counsel's affidavit[7] have been submitted.

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[7] This affidavit is the subject of a motion to strike by Defendant Rockefeller. That motion will be addressed below.

I. Defendant Rockefeller's Motion to Dismiss the Amended Complaint and Defendants Gilbertson and Miller's Motion for Judgment on the Pleadings and for Summary Judgment

These dispositive motions, although variously styled, present essentially the same arguments, that is, insufficiency of the pleadings, and failure to state a claim. In addition, Defendant Rockefeller asserts that injunctive relief is inappropriate in this case and that, in any event, injunctive relief against him as Governor of West Virginia, is precluded both on the grounds of immunity and because he is not a proper party to afford Plaintiffs such relief.

Defendants' argument relating to insufficiency of the pleading is based primarily upon the degree of particularity with which Plaintiffs have supported their claims through factual allegations in the complaint. In support

of this argument, Defendants point to two specific defects: First, that the conspiracy claim failed to allege with particularity any "overt act" which would indicate Defendants actually participated in a conspiracy; and second, that Plaintiffs' "knew or should have known" claim is supported only by conclusory allegations, which indicate that Plaintiffs rely solely upon the doctrine of respondeat superior for their recovery.

In the Court's opinion, Plaintiffs support both their theories of liability, i.e., the conspiracy claim under 42 U.S.C. § 1985 (3) and the "knew or should have known claim" under Section 1983, by detailed allegations.[8] The complaint describes the political history of the

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[8] Four pages of the complaint are devoted to the explication of facts relied upon for relief by Plaintiffs.

DOH, the chronology and character of the Defendants' service with State government, the relationships of the Defendants with each other and with the Plaintiffs, the opposing party ideologies of Plaintiffs and Defendants, the details of Plaintiffs' employment history and their terminations, a statistical survey of employment practices of the Defendants with the DOH relative to the hiring of Democrats and Republicans, the alleged power of Defendants Gilbertson, Miller and Rockefeller to control discriminatory practices, their alledged knowledge of such practices, and their alleged intent to continue, and/or failure to prevent such practices. (Complaint, Paragraphs 3-18).

Defendants correctly argue that civil rights pleadings must set forth with particularity those facts upon which the pleader relies for relief. United

Black Firefighters of Norfolk v. Hirst, 604 F. 2d 884 (4th Cir. 1979); Picking v. State Finance Corporation, 332 F. 2d 1399 (D. Md. 1971) affirmed 450 F. 2d 881 (4th Cir. 1971) cert. denied 405 U.S. 1048; 2A Moore's Federal Practice, §8.17(5) at 8-182 (1979). The purpose of such a requirement, however, is not to require Plaintiffs to plead all of their evidence but merely to provide the Defendants with facts sufficient to apprise them of the nature of the charges in order that they may adequately plead and defend the cause. Picking v. State Finance Corporation, supra; Vasquez v. Ferre, 404 F. Supp. 815 (D. N.J. 1975); Jordan v. Wolke, 460 F. Supp. 1080 (E. D. Wis. 1978). Plaintiffs need not plead evidentiary facts in the complaint. E.g. School District of Kansas City, Missouri v. State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978); Yates v. Mahogony

Ass'n., 129 F. 2d 227 (3d Cir. 1941).

Pleadings are to be judged by substance, rather than by form, to facilitate the fair and just resolution of controversies between litigants; they should not be construed to raise barriers which prevent the achievement of that end. Matz v. Grasselli Chemical Co., 303 U.S. 197 (1938); Conley v. Gibson, 355 U.S. 41 (1957). In Ratcliffe v. Insurance Company of N. America, 482 F. Supp. 759 (E. D. Pa. 1980) the court was presented with the precise argument being made by Defendants here, i.e., that because civil rights cases require pleadings be made with factual specificity, Plaintiffs' claim should be dismissed. The court stated there that even though certain portions of the complaint were cast in conclusory language, where other sections alleged discriminatory acts with sufficient

specificity to meet the requirements of Rule 8, Federal Rules of Civil Procedure, and to give adequate notice of the charge to be defended, Defendants' motion to dismiss the complaint would be denied.

Similarly, in School District of Kansas City, Missouri v. State of Missouri, supra, the complaint was held reviewable under the provisions of Rule 8(a) requirements, not against some stricter standard.[9] The Court held there that the complaint was sufficient when it

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[9] This Court is of the opinion that those cases holding that greater specificity is required in civil rights complaints than in other types of complaints are not altering the basic rationale behind Rule 8, but are merely acknowledging the necessity for protection of Defendants' right to be adequately advised of the charges against him in an area of law wherein conclusory allegations provide the potential for abuse of the judicial process. The requirements of Rule 8(a) incorporate the rules of notice pleading, and are accorded a liberal construction. Conley v. Gibson, supra.

alleged that defendants transferred students for purposes of segregation, discriminated in employment, prevented changed in district boundaries which would have reduced segregation, and failed to correct the effects of pre-1954 segregation. The allegations set forth in Plaintiffs' complaint here are no less specific than those found sufficient in School District, and the Court would find, therefore, that the complaint was pleaded with sufficient particularity.

The Court's ruling just stated applies to both the "knew or should have known" claim and the conspiracy claim. Defendants argue that the conspiracy claim is defective as failing to allege an "overt act"; however, the Court deems that allegation in which Plaintiffs state they were terminated by reason of their political affiliation to meet that

requirement specifically.[10/] In reviewing the sufficiency of a complaint alleging conspiracy, the Court must take cognizance of the fact that Plaintiffs' access to specific facts surrounding a civil rights conspiracy is often limited; therefore, a certain degree of liberality in construction is warranted, particularly with regard to those allegations concerning combination of the conspirators. Vasquez v. Ferre, supra.

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[10] DeVitt and Blackmar defines an "overt act" as:

"Any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. . . . It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows or tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy. . . ."

2 DeVitt and Blackmar, Federal Jury Practice and Instructions, § 27.07 at 22 (1977).

The complaint is sufficient when it otherwise states a claim upon which relief can be granted.

Having found the complaint filed herein to be sufficiently specific to inform the Defendants of the charges which they are to defend, the Court now proceeds to determine the issue of whether a claim has been stated. Defendants do not seriously contend that political discrimination provided no basis for a cause of action in this Court; they could hardly do so in light of Elrod v. Burns, supra, and Branti v. Finkel, supra. Their argument, instead pivots around two supplemental contentions: (1) That because the pleadings are nonspecific as to particular actions taken by each Defendant, the Court can only conclude that Plaintiffs' theory of liability rests upon the doctrine of respondeat

superior; 11/ and (2) That, in the absence of such specific allegations, Defendants' averments of good faith should permit the Court to award Defendants judgment on the merits. The Court is not persuaded that Plaintiffs' complaint is deficient for either reason.

With regard to those contentions addressed to the merits, the Court would note that the parties have engaged in extensive discovery during the pendency of this action. In their second argument, Defendants have not made reference to the record in any comprehensive fashion to support their position that summary judgment on the merits is appropriate. Had they done so, the Court believes that material issues

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11 Plaintiffs cannot base a civil rights claim upon the theory of respondeat superior. Vinnedge v. Gibbs, 550 F. 2d 926 (4th Cir. 1977).

of fact would be shown in dispute. The complaint is not deficient for failing to overcome Defendants' allegations of good faith. Indeed, the United States Supreme Court held recently in Gomez v. Toledo, 446 U.S. 635 (1980) that plaintiff need not even allege bad faith in his complaint, that good faith is merely a matter of defense to be proved or disproved at trial. Clearly, then, Defendants' second argument must fail as a basis for dismissal of this action.

Defendants' first argument premises upon a finding by this Court of insufficient particularity in the pleading. Since the Court has determined otherwise, the sole question remaining is whether proper theories of liability have been asserted. To establish a conspiracy claim under Section 1985(3), Plaintiffs must allege four elements, that is:

1. That Defendants did conspire;

2. For the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection laws, or of equal privileges and immunities under the laws;

3. That one or more of the conspirators did, or caused to be done, any act in furtherance of the object of the conspiracy, whereby another was

4(a). Injured in his person or property, or

4(b). Deprived of having and exercising any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88 (1971). Brekenridge involved an alleged deprivation of the black plaintiffs' right to free speech, assembly and association; the United States Supreme Court held these allegations supported the requisite animus to deprive plaintiffs of equal enjoyment of a legal right so as to state a claim under

Section 1985(3). Although Breckenridge involved allegations of invidious racial discrimination, a Section 1985 action may properly be based upon political class-based animus, as indeed, plaintiff did in Elrod. See also, Kimble v. D. J. McDuffy, Inc., 648 F. 2d 340 (5th Cir. 1981); Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 1979) reversed in part on other grounds 446 U.S. 754, rehearing denied 448 U.S. 913; Gibbins v. Bond, 623 F. Supp. 845 (W.D. Mo. 1981) affirmed 668 F. 2d 967 (8th Cir. 1981). Cf., Marino v. Bowers, 657 F. 2d 1363 (3d Cir. 1981). Since Plaintiffs have alleged facts which, if assumed to be true, allege each element of a cause of action under Section 1985(3),[12] it is clear that a

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[12] Plaintiffs have alleged (1) a conspiracy; (2) their membership in a class of persons deprived of equal protection of the laws; (3) an overt act; and (4) injury to their property interest in employment.

claim upon which relief can be granted has been stated in Plaintiffs' complaint.[13]

The cause of action previously styled a "knew or should have known" claim falls under the provisions of 42 U.S.C. § 1983. As Plaintiffs correctly argue, only two allegations are necessary to state a claim under that section: (1) That some person deprived Plaintiffs of a federal right; and (2) That such person acted under color of state or territorial law. Gomez v. Toledo, supra. Elrod V. Burns makes clear that the acts complained of by Plaintiffs here implicate both First and Fourteenth Amendment rights. Defendants, with the exception of Defendant Wilton Williams, admit they were acting under color of

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[13] Plaintiffs might also establish their conspiracy claim pursuant to the provisions of Section 1983, under the following analysis.

State law when the alleged terminations occurred. These facts are sufficient without questions to state a claim against Defendant Gum. However, Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient based on Plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these Defendants in the acts complained of. See Rizzo v. Goods, 423 U.S. 362 (1976). In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant "knew or should have known" of the challenged practice, but evidenced deliberate indifference to Plaintiffs' constitutional rights. Orpiano v. Johnson, 632 F. 2d 1096 cert. denied 450 U.S. 929. Since, in an action under the authority of Elrod and Branti, Plaintiffs' prima facie case does not

include dis-proof of an independent reason for the discharges, Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1976), Miller v. Board of Education of County of Lincoln, supra, the complaint herein, again assuming the truth of the facts alleged for the purposes of this motion, states a claim upon which relief can be granted under Section 1983. See also Brule v. Southworth, 611 F. 2d 406 (1st Cir. 1979); Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980) cert. denied 451 U.S. 907 (1981). In summary, both of the theories of liability relied upon by Plaintiffs properly assert the stated causes of action.

One additional ground for dismissal was raised by Defendant Rockefeller in his motion, although not briefed by his memorandum: That the injunctive relief sought by Plaintiffs was not properly

directed toward him as Governor. The Court is of the opinion that this argument lacks merit, in view of the nature of the injunctive relief sought, i.e., a permanent injunction against all Defendants restraining them "from further violating the rights and immunities granted to Plaintiffs under the Constitution of the United States of America." (Complaint, p. 9 Paragraph a). Such an injunction, if issued, would appropriately be directed toward all Defendants, including Defendant Rockefeller. Neither is reinstatement an inappropriate remedy. McMullan v. Thornburgh, 508 F. Supp. 1044 (E. D. Pa. 1981) construing Johnson v. Bergland, 586 F. 2d 993, 995 (4th Cir. 1978). See also Burns v. Elrod, 509 F. 2d 1133, 1135 (7th Cir. 1975). Therefore, this remaining ground for dismissal must also be denied.

II. Defendants' Motion for Summary Judgment Based on Official Immunity

Defendants Rockefeller, Gilbertson and Miller urge the Court in this motion to award them summary judgment based upon the qualified immunity each possesses as State officials. See Scheuer v. Rhodes, 416 U.S. 232 (1974). The basis for their argument rests upon the United States Supreme Court's recent holding in Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727 (1982), wherein the Court held that "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

at 2738.[14/] In their motion, Defendants argue that the law governing "patronage termination" is not clearly established, and that, therefore, summary judgment is appropriate. Specifically, Defendants claim that Elrod and Branti preclude relief unless political affiliation can be shown the "sole cause" of Plaintiffs' terminations, and that "sole cause" has been accorded such varying interpretations in subsequent decisions that this Court must determine the constitutional rights at issue not "clearly established" for the purposes of evaluating the propriety of summary judgment under Harlow. Under this theory, Defendants argue that, given the necessity for a reduction in force which

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[14] The Harlow Court expressed no view upon the effect of a defendant's immunity defense in an action for injunctive or declaratory relief. Id at 2739, n. 34.

existed in fiscal year 1981, even if Defendants terminated Plaintiffs because of their affiliation with the democratic party, the law which purports to preclude this action was not so "clearly established" as to warrant continuation of this action againt them. Thus Defendants content they could not have been expected to realize that, even if an independent reason for terminating some person existed, they would not be free to select exclusively Democrats for that purpose, since those firings could not have resulted "solely" from political considerations. The Court cannot agree with this analysis.

Plaintiffs' constitutional right to freedom from termination based upon political affiliation or association has been "clearly established" since the Supreme Court's decision in Elrod. The same constitutional principle was

subsequently reaffirmed in Branti, prior to Plaintiffs' terminations.[15/] This case does not present the type of situation involved in Procunier v. Navarette, 434 U.S. 555 (1978) where defendants were held not liable for failure to foresee the establishment of a constitutional right prior to its enunciation.

Here, Defendants admit to actual knowledge of the ban on politically motivated terminations established in Elrod.

The test which governs the determination of whether a plaintiff's

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15 The Supreme Court's subsequent decision in Branti did revise the standard for determining which public employees were protected under Elrod; however, that revision concerned whether a plaintiff need establish his status as a "non-policy making, non-confidential" public employee. Defendants' argument is not directed toward this issue, but rather toward the role which political considerations may properly play in the decision to terminate an employee.

First and Fourteenth Amendment rights have been infringed by reason of a "political firing" is as clearly established as the right. This Court's decision in Miller v. Board of Education of County of Lincoln, supra, decided in 1978, applied the standard set forth in Mt. Healthy City Board of Education v. Doyle, supra, a test which has uniformly applied to patronage dismissal actions since that time. Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980) cert. denied 451 U.S. 907 (1981); Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1981) cert. denied 454 U.S. 832 (1981); Nekolny v. Painter, 653 F. 2d 1164 (7th Cir. 1981) cert. denied 102 S. Ct. 1719 (1982); Barrett v. Thomas, 649 F. 2d 1193 (5th Cir. 1981) cert. denied 102 S. Ct. 1769)1982); McMullan v. Thornburgh, supra, Farkas v. Thornburgh, 493 F. Supp. 1168 (E.D. Pa. 1980) affirmed mem. 633 F. 2d 209 (3d

Cir. 1980) affirmed mem. sub nom appeal of Farkas 642 F. 2d 441 (3d Cir. 1981); Visser v. Magnarelli, 530 F. Supp. 1165 (N.D. N.Y. 1982); Abraham v. Pekarski, 537 F. Supp. 859 (E.D. Pa. 1982).[16] The Mt. Healthy test, reaffirmed in Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), provides that, once plaintiff has satisfied his prima facie burden of demonstrating (1) that his conduct was constitutionally protected; and (2) that his conduct was a "substantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the

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[16] Although Sands v. Starke County Board of Commissioners, 530 F. Supp. 712 (N.D. Ind. 1982) did not cite the Mt. Healthy test in its decision, it did rely upon the opinion in Wren v. Jones, supra, which did apply Mt. Healthy.

protected conduct, i.e., that plaintiffs' political affiliation was not the "sole cause" of his termination. There is no inconsistency between "sole cause" and the Mt. Healthy/Givhan standard which might reasonably be viewed as the basis for misconception of the scope of Elrod and the public employees' first amendment rights. If the sole cause of Plaintiffs' terminations was a reason other than political affiliation, Defendants shoulder the burden of proof of that reason once Plaintiffs have established a prima facie case. The Court holds that Plaintiffs' constitutional rights were "clearly established" at the time of their terminations,[17] and thus that Defendants are not entitled to summary

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[17] The Court is further of the opinion that, in view of the expansive holdings in Elrod and Branti, Defendants reasonably could not have permitted political considerations to play a part

Defendants are not entitled to summary judgment on that ground.

Under Harlow, the ruling just stated completes this Court's analysis of Defendants' immunity defense for purposes of the instant motion. "On summary judgment, the judge appropriately (must) determine. . . whether the law was clearly established at the time an action occurred. . . . If the law was clearly

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(footnote 17, continued)

in the decision to terminate Plaintiffs even if the meaning of "sole cause" was not clearly established. Those decisions plainly prohibit conditioning public employment upon political affiliation. If in fact Defendants chose to interpret those decisions as permitting them to select for discharge only those of the opposing political party where a legitimate basis for discharging someone existed, they did so at their own risk. The Court cannot hold that a reasonable government official would have made such a determination in light of Elrod and Branti. For this Court to award Defendants summary judgment on the proffered basis would strip public employees of the protection afforded by the Elrod and Branti holdings.

established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." 102 S. Ct. at 2739.

The sole remaining ground relied upon by Defendants addresses itself to the merits of the case. Defendants argue, relying upon voluminous affidavits and exhibits, that their good faith has been conclusively established, and that the Court may find as a matter of law that they are, therefore, entitled to judgment. Plaintiffs' response, however, sets forth allegations which, if assumed to be true for the purposes of this motion, create genuine issues of material fact precluding summary judgment.[18] See

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[18] Defendants have challenged Plaintiffs' response by moving to strike the supporting affidavit of Plaintiffs' counsel submitted therewith. However, since this Court found it unnecessary to base its ruling upon the affidavit, the motion will be denied.

Scheuer v. Rhodes, supra, at 249-250.

Accordingly, in view of the foregoing, the Court hereby ORDERS:

1. The motion of Defendants Gum, Gilbertson and Miller for judgment on the pleadings is denied as moot;

2. The motion of Defendant Rockefeller for judgment on the pleadings is denied as moot;

3. The motion of Defendants Gum, Gilbertson and Miller for continuance and consolidation with trial on the merits is denied as moot;

4. The motion of Defendant Rockefeller for continuance and for consolidation with trial on the merits is denied as moot;

5. The motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment is denied as moot;

6. The motion of Defendants Gum,

Gilbertson and Miller to dismiss Plaintiff Drexelene Perrine is granted;

7. The motion of Defendant Rockefeller to dismiss Plaintiff Drexelene Perrine is granted;

8. The motion of Defendants Gilbertson and Miller for judgment on the pleadings and for summary judgment is denied;

9. The motion of Defendant Rockefeller to dismiss the amended complaint is denied;

10. The motion of Defendants Gilbertson and Miller for summary judgment based on official immunity is denied;

11. The motion of Defendant Rockefeller for summary judgment based on official immunity is denied; and

12. The motion of Defendant Rockefeller to strike the affidavit of Plaintiffs' counsel is denied.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: 7/21/83

/s/ Charles H. Haden, II
Charles H. Haden II,
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, et al, Appellees,

versus

Walter Gilbertson and
Charles L. Miller, Appellants,

and John Gum, et al Defendants.

No. 83-1791

John M. Bever, et al, Appellees,

versus

John D. Rockefeller, IV, Appellant,

and

John Gum, et al, Defendants.

O R D E R

The appellants' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A

poll of the court was requested, and in the poll there was an equal division of the participating judges in regular active service. Judges Russell, Widener, Hall and Chapman voted in favor of en banc rehearing while Judges Winter, Phillips, Murnaghan and Ervin voted against it. Judge Sprouse disqualified himself.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Haynsworth for a panel consisting of Judge Winter, Judge Hall, and Judge Haynsworth.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 83-1791

John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Drexelene Perrine, Francis D. Radcliff, Robert W. Robinson, Michael Shepherd, Larry Williams, Larry W. Griffin, Appellees,

v.

John D. Rockefeller, IV, Appellant,

and

John Gum, Walter Gilbertson, Wilton Williams, Charles L. Miller, individually and as Commissioner of the West Virginia Department of Highways, Defendants.

Appeal from the United States District Court for the _____ District of South Caroline.

This cause came to be heard on the record from the United States District Court for the _____ District

of South Carolina.

On consideration whereof, it is now here ordered and adjudged by this Court that a certificate of probable cause to appeal is denied, and the appeal is hereby, dismissed.

/s/ William K. Slate, II
CLERK

APPENDIX E

AMENDMENTS TO THE CONSTITUTION

(Amendment I)

(Freedom of Religion, of Speech, and of the Press)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(Amendment IX)

(Reservation of Rights of the People)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(Amendment XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virginia Island, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655 § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 17-2A-4. Selection, organization, classification, etc., of personnel; business manager and chief engineer assistants; employees' bonds.

The commissioner shall be in charge of and responsible for the selection, employment and effective organization of all commission personnel for the entire state road and highway program. He may establish such divisions, sections and other functional and organizational units within the commission as may be necessary and practical in the full and effective discharge of the duties and responsibilities of his office. Except as otherwise provided by law, all commission personnel shall be classified pursuant to the job classification system and shall be paid pursuant to the salary scale established by the commissioner.

The commissioner shall select and employ a business manager assistant and one or more chief engineer assistants who shall be registered professional engineers, and shall establish such other offices, activities, divisions, sections and organizational units as may be necessary and practical. The business manager assistant shall be in charge of and responsible for matters of finance and such other functions as may be assigned to him from time to time by the commissioner. The chief engineer assistant or, if the commissioner has selected and employed more than one chief engineer assistant, the chief engineer assistants shall be in charge of and

responsible for planning, equipment, materials, construction, maintenance, and such other functions as may be designated by the commissioner as well as such other functions as may from time to time be assigned to such chief engineer assistant or assistants by the commissioner.

The commissioner shall require every employee who collects fees or handles funds or who has custody or control of equipment or supplies belonging to the State to give bond, with such sureties and in such penal sums as may be approved by the commissioner, for the faithful discharge of each such employee's duties and his accounting for all such fees, funds, equipment and supplies coming into his hands or under his custody or control. All such bonds, when approved by the commissioner, shall be filed in the office of the secretary of state. Premiums on all such bonds shall be paid from commission funds. (1957, c. 143; 1973, c. 116.)

(3)

No. 83-2139

Office - Supreme Court, U.S
FILED
OCT 4 1984
ALEXANDER L. STEVAS
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN D. ROCKEFELLER IV, individually
and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BEST AVAILABLE COPY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's denial of petitioners' claim of qualified immunity, which can be resolved as a matter of law, is immediately appealable under the collateral order exception to 28 U.S.C. § 1291 enunciated in Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

2. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly established right of public employees under Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.*

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*Pursuant to Rule 21.1(b) of the Rules of this Court, the following is a complete list of the parties in the underlying proceedings (identified as plaintiffs or defendants in the district

court, and as appellants or appellees in the court of appeals):

Plaintiffs/appellees . . .John M. Bever,
Clearyl Davis,
John E. Ellifritt,
Cecil Fling,
Francis D. Radcliff,
Robert W. Robinson,
Michael Shepher,
Larry Williams,
and Larry W. Griffin,

Defendants/appellants . . . . John D.
Rockefeller, IV,
Walter Gilbertson
and Charles L. Miller,

Defendants. . . . . John Gum
and Wilton Williams.

In addition to these parties, the United States of America appeared as amicus curiae in support of Governor Rockefeller's Petition for Rehearing in the court of appeals.

Furthermore, defendants/appellants Walter Gilbertson and Charles L. Miller are, by their separate counsel, filing a petition with this Court for a writ of certiorari with respect to their claims of immunity.

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No. 83-2139

In the

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to the authority in Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court rules, John

Bever, et al, request that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

OPINIONS BELOW

The opinion of the court of appeals is reported as Bever vs. Gilbertson, 724 F.2d 1083 (4th Cir. 1983). However, the order denying petitioners' request for a rehearing with suggestion for rehearing en banc is not yet officially reported. The district court's opinion denying petitioners' motion for summary judgment is unpublished.

JURISDICTION

Petitioners depend for jurisdiction on the exception announced in Cohen vs.

Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) to the finality rule set out in 28 U.S.C. § 1291. Petitioners also claim jurisdiction to be based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents' claims, against which petitioner asserts qualified immunity, are brought under 42 U.S.C. §§ 1983 and 1985 and are based upon the First, Ninth and Fourteenth Amendments. The issue of appealability involves 28 U.S.C. § 1291. The question of employment authority in the West Virginia Department of Highways, which relates to the injunctive claims asserted against petitioner, is governed by W. Va. Code § 17-2A-4(1983). The texts of these constitutional statutory provisions are reprinted in Appendix

pages 87A-90A.

STATEMENT OF THE CASE

Petitioners seek review here of the refusal of the Fourth Circuit Court of Appeals to hear an appeal of the district court's denial of their motions for summary judgment based upon a claim of qualified immunity as outlined in Harlow vs. Fitzgerald, 457 U.S. 800 (1982). The court of appeals found it was without jurisdiction in the appeal since the interlocutory holding of the district court did not fall within the exceptions to the finality requirements of 28 U.S.C. § 1291 announced in Cohen vs. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949).

A. Respondents' claims and procedural history.

Respondents, all residents of

Doddridge County, West Virginia, are all former employees of the West Virginia Department of Highways who allege in their amended complaint, filed on March 28, 1983, that they were discharged by the petitioners in early and mid 1981 solely because of their political affiliation with the Republican Party.

Petitioner Rockefeller has been the Governor of West Virginia since January 1, 1977; Petitioner Miller was appointed by petitioner Rockefeller as his Commissioner of Highways in September, 1977; petitioner Gilbertson was appointed District Engineer for District 4 (which included Doddridge County) of the Department of Highways in November, 1977; defendant Gum was named (Doddridge) County Supervisor of the Department of Highways in July, 1977; and

defendant Williams was chairman of the Doddridge County Democratic Party executive committee throughout the setting of this action. All petitioners and defendants currently remain in the same positions as during the salient periods of 1981 recited in the pleadings.

Neither defendant Williams nor Gum is before this court. Gum was one of the summary movants but opted not to appeal the District Court's denial of his motion while Williams, not acting with official discretion, was not an immunity claimant.

These civil rights claims are stated in both the direct "knew or should have known" allegations as to petitioners, Rockefeller, Miller and Gilbertson as well as conspiracy claims as to all original defendants some of

whom are petitioners here. Further, the allegations charge petitioners had the power to prevent or aid in the prevention of the violation of respondents' rights but neglected or refused to act. The actions are founded in 42 USC §§1983 and 1985 with the predicate rights having been announced in Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980).[1]

Petitioners Rockefeller, Miller, Gilbertson and Gum filed answers denying

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[1] Petitioners' brief states the instant case is one of nine cases pending on the same issues of political patronage firing under the Rockefeller Administration. A number of these cases do not share the immunity issues raised here. Some have contended that the "fiscal" cutback by Rockefeller was contrived to gain the dismissal of plaintiffs thereby disguising the actual political reasons for terminiation by an invented fiscal crisis.

the factual allegations of Respondents (that they were fired because they were Republicans) and asserting a number of affirmative defenses including the common law "absolute immunity or (Miller, Gilbertson and Gum claimed "and") qualified immunity or both" based upon their assertions their acts were protected from liability inasmuch as each was acting in his respective official capacity as a state official.

These defenses of immunity became the subject of separate motions for summary judgement. Although the motions were entitled to suggest assertions of "official immunity", the content of both briefs properly characterized the defense as "qualified immunity" as most recently defined by Scheuer vs. Rhodes, 446 U.S. 232 (1974) and refined in

Harlow vs. Fitzgerald, supra. Any claim of "absolute immunity" or the "and/or" combination of both absolute and qualified immunity raised alternatively in the responsive pleadings was abandoned.

As a portion of the motions for summary judgement petitioners claimed that respondents were "laid off" because of "budgetary constraints" and that if political affiliation played a role in the decision to select these appellees for "lay-off" it was not the "sole" reason. By virtue of the multiple reasons for the "layoff", according to the summary judgment movants, an undiluted Elrod-Branti firing was not applicable to the termination of Respondents thus rendering the state of the law as not "clearly established". Such a state

of the law, at the time of petitioners' action, would thereby shield movants from liability for damages when exercising discretionary functions under the auspices of Harlow. Thus petitioners asserted that in a budget-inspired cutback the selection of respondents for termination soley because of their political party affifilation was constitutionally acceptable.

On July 21, 1983, the district court[2] denied the respective motions for summary judgment by a written opinion. App. p. 44-A. The court found that the law was "clearly

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[2] Rockefeller's counsel asserted, in the memorandum in support of summary motion: "A literal reading of Elrod and Branti stongly suggests that the discharge of a public employee for political reasons is permissible, so long as it is not the sole

established" by virtue of the Elrod and Branti holdings and prohibited the

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justification." "Given these facts (that plaintiffs' terminations were inevitable because of "fiscal necessity") and presupposing even that the selection of the plaintiffs for termination was politically tainted, the question thus arises as to the nature of the constitutional right allegedly abridged in the cases and, indeed, whether a constitutional right is implicated in these cases at all".

selection of respondents for dismissal because of their political affiliation regardless of the predicate basis for the decision to terminate "someone".

In the same opinion, the district court ruled on a motion which raised an issue repeatedly re-asserted in petitioners' briefs here: That petitioners, by their own self-serving affidavits, had no role in the selection of respondents for discharge whether or not political considerations were involved in that decision.

The district court found that such affirmative direct involvement was not a necessary ingredient in deciding the issue of § 1983 culpability as charged in the pleadings: "Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient

based on plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these defendants in the acts complained of (selection for termination because of political party affiliation)." On this issue the district court found: "In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant 'knew or should have known' of the challenged practice, but evidenced deliberate indifference to plaintiffs' constitutional rights." App. p. 68A.

Further, the district court found that the affidavits and exhibits filed with the summary motion went "to the merits of the case" in an attempt to show petitioners' "good faith had been conclusively established, and that the

court may find as a matter of law that they are entited to judgment". Taken as a summary motion apart from the qualified immunity issue, the court denied motion since the record revealed genuine issues of fact.

After the district court denied requests for certification for immediate appeals as interlocutory orders under 28 U.S.C. 1292(b), petitioners filed notice of appeal and eventually secured, from Judge K. K. Hall of the Fourth Circuit, a stay of the impending trial as well as his finding that the district court's denial of the summary motion was an appealable order under Cohen.

The majority of a panel in the court of appeals reversed the single judge's decision and Judge Hall authored the dissent discussed so prominently in petitioners' briefs. An equally divided

vote of active justices in the circuit court caused the panel decision to stand and prompted this writ.

The court of appeals panel, in finding it had no jurisdiction under the Cohen exception, addressed only two of the four requisites set out for the characterization of the interlocutory order as appealable in Cohen. Since all four requirements must be present the failure of two defeated the Cohen application. Petitioners' brief somehow concludes that by not specifically ruling on two of the issues, they must have been decided in favor of petitioners.

The two Cohen ingredients were that since a trial on the merits must decide the issues for injunctive relief, which require the same proof as the damage claim, the qualified immunity

claim cannot save petitioners from a trial. But most importantly, the circuit court found also that the state of the law applicable to firing on the sole basis of party affiliation was not "unsettled" to a reasonable person when respondents were terminated.

Finding those two impediments to the Cohen exception, the court of appeals had to proceed no further to deny jurisdiction under the finality rule.

B. State of the record below.

Contrary to the assertions of petitioners' briefs, the record before the district court in deciding the motion for summary judgement included extensive discovery in the form of depositions and interrogatories. The court below considered this record, the affidavits of petitioners and argument

of counsel in deciding the motions.

Some specific recitations there include the following.

James Bowen, an Assistant Superintendent of the Doddridge County Unit of the West Virginia Department of Highways, testified in his evidentiary deposition that he personally informed Rockefeller of the harassment of employees affiliated with the Republican party and he further discussed that problem with one of Rockefeller's confidential aides. Bowen also testified that his father-in-law, Roncil Burton, now deceased, the then County Democratic Executive Committee Chairman in Doddridge County, met with Rockefeller and informed him of politically motivated harassment of Republican employees by defendant Gum. Bowen gave the same information to Miller and Gil-

bertson. Moreover, Gilbertson disclosed in his deposition that Department of Highways records reflect political clash causing defendant Gum to retaliate against respondent Bever by suspending and demoting him from his position.

Another deponent, Michael O' Brian, who is merely a private citizen of Doddridge County and unaffiliated with any party in this action, testified that he attended a public meeting conducted by Rockefeller at a small college during which he told Rockefeller that politics controlled the jobs and the roads in Doddridge County. Rockefeller refused to discuss that issue with him and summarily dismissed the complaint as a private matter. O'Brian then tried to telephone Rockefeller by placing a long distance call from the Department of Highways office in Doddridge County. He

was then informed of criminal prosecution for making the call and incurring the cost thereof on a state telephone bill.

Larry Swann, a member of the West Virginia legislature, and in fact, the leader of the minority Republican party testified on deposition that together with the same Roncil Burton he met with Governor Rockefeller at his office to tell him of the politically motivated harassment of Republican employees in Doddridge County by defendant Gum. Swann also testified that membership in the Doddridge County Democratic Executive Committee was necessary to obtain employment with the Department of Highways.

Rockefeller was named as a defendant in three previous civil rights actions alleging violations of the Elrod vs.

Burns in the Department of Highways. Each was filed and personal service was effected on Rockefeller as Court records indicated before the 1981 terminations occurred.

Yet, Rockefeller testified that he was not informed of the filing of these suits, and was not aware of the claims made until late 1981 when this deposition was taken in connection with one of those cases, but he had no office procedure to provide him with the substance of any suit.

Rockefeller also received other information from reliable individuals concerning terminations caused by political affiliation. One letter from a partner in the Charleston, West Virginia law firm which included Rockefeller's then counsel scolded that the political basis for firing bottom-

level employees was continuing.

Rockefeller responded to the Elrod decision by issuance of an executive order in November, 1978, and took no further acion to remedy politically motivated employment discrimination against Republicans which has occurred subsequent to that executive order and resulting in civil rights actions and letters to be written to the Governor concerning that discriminatory treatment.

Additionally, Department of Highway records developed in the discovery indicated that the Department's Equal Employment Opportunity Affairs Officer stated at meetings that the termination of employees in the 1981 terminations were politically motivated.

In addition to the above-described factual evidence, there is voluminous

factual evidence directed at defendant Gum, who made statements to plaintiffs and non-party witnesses of his animosity toward Republicans and his intention to terminate Republican affiliated employees. Further the plaintiffs have developed significant statistical evidence, as testified to on deposition by Dennis P. Bradly, Ph.D., who as a qualified expert witness in statistical analysis data in combined form and has determined that the termination rate of Republicans affiliated employees was 3.9 standard deviations higher than expected, a figure of significance, coupled with other direct testimony, in the determination of patronage dismissals.

REASONS WHY THE WRIT SHOULD NOT ISSUE.

I. The directives of the Cohen

case, allowing an appeal of of certain specified interlocutory orders as an exception to the finality rule, have not been met.

Petitioners allege that the denial by a clearly interlocutory order in the district court of their motions for summary judgment based upon the qualified immunity from damage claims, available to them as state officials, should be appealable here under the auspices of Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and restated in Coopers & Lybrand Livesay, 437 U.S. 463 (1978). As recited in Nixon vs. Fitzgerald, 457 U.S. 731 (1982) the Cohen "collateral order" doctrine is:

". . . a small class of inter-

> locutory orders are immediately appealable to the courts of appeals. As defined by Cohen, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgement." As an additional requirement, Cohen established that a collateral appeal of an interlocutory order must "present a serious and unsettled question".

The Fourth Circuit Court of Appeals found the application of the Cohen rule failed in two of its four directives. Bever vs. Gilbertson, 724 F.2d 1083 (4th Cir. 1983). First, the rationale of the requirement of that interlocutory order must have decided an issue which would be "effectively unreivewable on appeal from final judgment". Stated conversely, if the issue is not appealable before final judgement any decision by an appellate body would be ineffective to accomplish the very

end of the asserted right - to prevent a trial at all.

Secondly, the court of appeals found that the decision of the district court did not involve a "serious and unsettled" question.

With two prerequisites of the Cohen rule unavailable to petitioners, the court of appeals did not address the remaining issues.

In deciding the first element, the court of appeals noted that the present action involved a claim for prospective injuctive relief against petitioners in their respective capacities as public officials requesting reinstatement and the prohibition of petitioners "from further violating the right and immunities guaranteed to (respondents) under the constitution". The redefining of qualified immunity in Harlow vs.

Fitzgerald, 457 U.S. 800 (1982) specifically limited qualifed immunity to "damage" claims and expressed "no view as to the condition in which injunctive or declarative relief might be available'. Thus the asserted immunity could not protect petitioners from a trial on the merits involving the very same substantive issues as in the proceeding for damages in petitioners individual capacities from which protection is sought, those issues involve the proof of patronage dismissal in violation of Elrod-Branti. Only the requested relief varied - damages arguably protected by qualified immunity and injunctive relief clearly not so protected.

Thus the court of appeals found that the prevention of petitioners participating in a trial on the merits

could not be effectuated by Harlow qualified immunity, and, thus, a denial by the district court of summary relief on that issue would not be rendered "effectively unreviewable on appeal from a final judgement". Since the trial of the injunctive relief would "hale" petitioners into court anyway, the issue of qualified immunity to damage claims aggainst the same persons in different hats could wait until final judgement.

The court found: "The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgement". App. p. 16A. Petitioners quote Judge Hall's dissent as raising the specter of qualifed immunity being effectively gutted by the majority's reasoning because artful pleaders will simply "tack on" a prayer for

injunctive relief thereby defeating the vitality of the immunity bar. App. p. 35A. The dissent apparently suggests the remedy that injunctive relief be abolished at least in § 1983 cases. There are sanctions to a pleader who would participate in such a "pernicious practice" can be accomplished less intrusively than the wholesale abolition of the jurisprudence supporting injunctive relief. Such a pleader must comport with Rule 11 of the Rules of Civil Procedure and its internal remedies, but, more importantly, the district court can inspect the basis for the injunctive relief as accomplished here, and dismiss such claims that are either facially without factual merit or that require relief not available against individual In the present case, the

district court found "all" of the petitioners to be proper parties to the injunctive claim. App. p.70A.

The court of appeals responded to the protestations in the dissent that only petitioner Miller should be a party defendant to the injunctive claim by pointing out that although petitioner Miller is specifically given authority in matters of employment in the Highways Department by statute, both he and his subordinate, petitioner Gilbertson, are in turn servants "at the will and pleasure" of petitioner Rockefeller. Thus, any injuctive relief to effectuate respondents asserted rights must include <u>all</u> petitioners. App. p. 11A N.1.

Thus the "effectively unreviewable on appeal" element of Cohen could not be met in the instant case. To alter that

element in the present case, this court must fashion some rememdy that would at once allow a trial with proper parties to an injunctive claim which shares identical issues with a damage claim which is to be prohibited by objective, good-faith, qualified immunity. An answer to such a dilemma not only does not seem ready or desireable.

Petitioners here could simply answer that having given themselves to public life they need never fear a court appearance for blatant wrong doing. That alteration certainly cannot fit this case.

The second element of the Cohen rule found to be wanting by the court of appeals was the failure of the interlocutory order to provide a "serious and unsettled question". App.p. 19A.

The court found that in 1981

respondents were clearly protected by Elrod-Branti from termination based solely upon political affiliation. App. p. 20A. The district court had easily reached the same conclusion. App. p. 73A. Thus the state of the law is not "unsettled" in 1981 (or now for that matter).

The Harlow case segmented the "good faith" qualified immunity into the "objective" element - whether the law applicable to the conduct was "clearly established" to a "reasonable person" at the time of the act - which standard, being devoid of any factual predicate and clearly an analysis of the state of the law at a given time, is given to summary decision.

Contrary to petitioners'[3] claim, the "subjective" element of qualified

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[3] Capsulized, the Harlow qualified immunity holding finds: "For executive

(footnote 3 continued)

officials in general, however, our cases make plain that qualified immunity represents the norm. In (Scheuer) we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity" (S.Ct. p. 2733). Further developing qualified immunity, the court noted two "aspects" as "objective elements" which it says "involves a presumptive knowledge of and respect for basic unquestioned constitutional rights"; and "the subjective component refers to 'permissible intentions'". Noting the desirability of disposing of the defense by summary judgement and the impediment to that avenue provided by the "subjective component", the court held that the "objective test" will measure the validity of the defense on even a pre-discovery basis (S.Ct. p. 2738-2739).

"We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". (cites omitted)

* * *

"Reliance on the objective reasonableness of an official's conduct as measured by reference to clearly established law, should avoid excessive disruption of government and permit the

(footnote 3 continued)

resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonable competent public official would know the law was governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily an objective factor."

immunity was not eleminated by Harlow since it involves a factual determination as to whether an official, as a not the "reasonable man", in fact, "knew or should have known the relevant legal standard".

In contending that the Cohen "serious and unsettled" requirement have been met here, petitioners claim first that since petitioners allege that "budgetary" considerations led to their decision to terminate some employees, they were entitled to select respondents for termination from the pool of employees based upon political affiliations since, from their perspective, it was not the "sole" consideration in the termination. Such contentions have punctuated petitioners'

briefs since the appealability of the summary denial first appeared to offer a pre-trial appeal. Interestingly, none of the petitioners have ever claimed in their affidavits or depositions that the directives of Elrod-Branti were not fully known and specifically applied here. In fact petitioner Rockefeller specifically acknowledged in his deposition (taken after the ban on discovery as per Harlow) that "even" allowing political affiliation to "play any part at all in determining who is to be laid off or terminated at any time" was "not to be considered proper".

All petitioners have similarly claimed adherence to Elrod-Branti as the district court found in the record below. App. p. 74A. Thus all had actual knowledge of the legal impediments to using political affiliation as an

ingredient in selecting respondents for termination. Only the allegations of counsel in brief are the contrary.

With actual knowledge, petitioners can't even escape to the "reasonable man" refuge. As outlined in the first concurring opinion in Harlow by Justice Brennan and joined by Justice Blackmun and Justice Marshall and the majority writer, Justice Powell:

> "I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his ctions. Ante, at 2737, 2739. This standard would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board" to all "government officials performing discretionary functions."

Like the dissent in the court of appeals, petitioners cite Wren vs. Jones, 635 F.2d 1277 cert. denied as being in petitioner Rockefeller's words "far more akin to petitioners' situation than either Elrod or Branti". In fact he takes the somewhat curious position that "contrary to what the Fourth Circuit suggested in its opinion below, this is simply not an Elrod or a Branti case." This statement apparently stems from a preception some factual disparity of the present case from those holdings and ignore the wide-sweeping constitutional interpretation of those decisions.

The Court of appeals decision dismissed the dissent's reliance on Wren as being "nothing like" the present case since political affiliation was not

even a factor.[4]

As the only circuit court case cited in support of this threshold "unsettled" proposition, Wren is a per curiam opinion which admits by its own language to being "unique" (p. 1283).[5] Note may be taken as to its date and unsuccessful appeal in determining its applicability to petitioners' assertions of an unclear and unsettled state of the law when they fired appellees in February and June, 1981.

As a supposed fiscal "independent justification" case which is to unsettle Elrod-Branti, Wren requires close scrutiny for its application to the

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[4] In briefs below petitioners cited many cases for this proposition none of which stood for the "independent justification" theory proposed by petitioners and all decided after the acts complained of" here.

[5] The opinion appeared in the advance

instant case. From a full trial record, the facts revealed are that, as per Illinois tradition, when Democrat Governor Shapiro prepared to leave office in November, 1968, he extended civil service coverage to the Department of highways and the Department of Mental Health insure his patronage democrats would be job secure when the Republican governor-elect Oglivie took office in January, 1969. However, when Oglivie took office he "expunged" Shapiro's civil service maneuver, and replaced the Shapiro democrats with Oglivie republicans. Twenty-five of those replaced by Ogivie filed a §1983 action entitled the Bradley case. While this case was pending, in November 1972

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sheets February 23, 1981 and in the bound volume May 3, 1981. The denial of cert. dated March 3, 1981, appeared in the advance sheets December 15, 1981, and has not yet been published in a bound volume.

Oglivie tried to freeze his Republican patronage employees by the same civil service declaration tried by his predecessor. The reason, of course, was that a Democrat, Walker, had been elected governor and was due to take office in January, 1973. With Democrat Walker in office, the Bradley case was tried and plaintiffs there were ordered reinstated in April, 1973. An order entered in May, 1973 threatened contempt for failure to abide by the opinion's directive of reinstatement.

Shortly thereafter, "financial restrictions" prompted the layoff of 540 highway workers. So, highway officials were "confronted with the specter of having 50 employees to do work formerly performed by 25 employees" during a time others were being laid off because of fiscal short-fall (the current euphemism

for being broke).

With that the highway officials devised the means of "selecting those employees for 'lay-off'" (p. 1280). All of the workers in both the Highway Department and the Mental Health Department were Oglivie-placed Republicans including Wren and the other plaintiffs. Therefore there was no element of partisan selection (totally unlike the instant case) as noted (p. 1286):

> "The fact that all potentially affected employees were Republicans means that the Wren plaintiff's political association was of no consequence. . ."

Even without party affiliation a factor, the "selection" process for the "lay-off" implementation of the Bradley reinstatement order was objective. Those workers who actually had replaced the Bradley workers were first

identified - this produced fifteen slots. When those who had displaced workers who had actually replaced Bradley employees were identified, this produced another six slots in the Highway Department the remaining four slots "could not be identified precisely (therefore) persons were laid off on a random basis". The single employee in the Mental Health Department was selected by means stated as "the last person hired was laid-off" (p. 1280).

Modestly characterized as "unique" and "unusual" the district court there addressed the facts of this sort of double Elrod case by applying the procedure set out in Mt. Healthy Board of Education vs. Doyle, 429 U.S. 274 (1977) to a full trial (p. 1283) and ordered reinstatement of the Wren plaintiffs with damages assessed.[6]

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[6] Restating the Mt. Healthy holding,

(footnote 6 continued)

the district court here stated: "The Mt. Healthy test, reaffirmed in Givhan vs. Western Line Consol. School Dist., 439 U.S. (1979), provides that, once plaintiff has satisfied his prima facie burden of demonstrating (1) that his conduct was constitutionally protected, and (2) that his conduct was an "unsubstantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the protected conduct, i.e., that plaintiffs' political affiliation was not the "sole cause" of his termination."

> "Under Givhan (first phase) the initial burden is upon plaintiffs to show that their conduct was constitutionally protected. Plaintiffs must next establish that this conduct was a "substantial factor" or a "motivating factor" in defendants' decision to discharge them from the Highway Authority."
>
> "If that is proven, (second phase) the defendants have the burden to show by a preponderance of the evidence that they would have reached the same decision notwithstanding the protected conduct. If the plaintiffs are to recover, the court (or jury) must expressly find that plaintiffs would not have been discharged "but for" the constitutionally immunized activity."

On review the Wren panel again applied the Mt. HealthyGivhan two-phased burden shifting rule (p. 1285-1286):

The Court justifiably found that upon review of all the evidence (not on pretrial hypothesized facts as here) that the Wren plaintiffs had not satisfied that portion of the first phase demanding the prima facie burden that "political affiliation was the motivating factor in their discharge". (p. 1286)

Yet, as it is apparently the habit of courts in these §1983 cases, the court went on to "assume arguendo, that plaintiffs have satisfied the first part of the Mt. Healthy test, we find that the defendants have, by a preponderance of the evidence, established that fiscal restraints required a reduction in the affected units equivalent to the number

of reinstated Bradley employees . . ."

This holding, then, instead of revealing the state of the Elrod-Branti holdings as being not "clearly established" by the introduction of an "independent justification", clearly and specifically holds that the law clearly placed that "independent justification" in the defendants' quiver for use in rebutting plaintiffs' prima facie case if that initial burden is met.

Petitioners also cite Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) for the proposition that the Elrod-Branti dictates are "neither clear nor clearly established", and, surely, "unsettled" for Cohen. General language is quoted indicating that in employee discharge issues involving "first amendement" expressions

"controlling doctrine - both substantive and procedural - is still evolving and by no means yet authortatively settled." However, any reading of the specifics of the decision reveals a clear state of the law which not only acknowledges Elrod-Branti rights but confirms that the procedure appropraite for determining any challenge to the "sole" cause issue is the Mt. Healthy matrix for the reception and sorting of facts. The decision first announces the undiluted right announced in Elrod-Branti, then the method of resolution of "unrelated" reasons for discharge:

> "Third, neither may a public employee be discharged solely because of the employee's political party affiliation, unless the employer can show that affiliation with the employer's party is essential to the employee's effectiveness in carrying out the responsibilities of the position held. Citation to Elrod and Branti.
>
> Fourth, notwithstanding proof

(or concession) that a public employee's discharge was based at least in part upon over expressive conduct, party affiliation, or both, an employer may yet avoid liability for violation of protected first amendment rights by proving that the

discharge would have ben made in any event for reasons unrelated to any exercise of protected first amendment rights. The burden to prove this avoidance defense is upon the employer." (citation omitted).

A footnote to this passage focuses even more clearly:

"Although the impermissible motive in Mt. Healthy itself was overt expressive conduct, we agree with those courts that have applied the principle as well to party affiliation cases. The Mt. Healthy procedure for sorting out mixed motives fairly accommodates the reality that in practically any party affiliation discharge situation some unrelated reason may also be advanced by the employer. By applying the Mt. Healthy proof scheme, the critical issue whether a discharge was solely for party affiliation reasons can be fairly addressed. If the employer does not carry its burden of providing that the discharge would have occurred irrespective of party affiliation, it can safely be taken that party affiliation was effectively the only reason." (citations omitted)

Jones then properly places a challenge to the Elrod-Branti "sole" cause in the proper role - as an ingredient in the defendant's proof scheme under Mt. Healthy - not as emasculating a clearly established right. In West Virginia the district court below in the present case had found the exact same role of a so-called independent justification in Miller -----vs. Board of Education of County of Lincoln, 450 F. Supp. 106 (S.D. W.Va 1978).

The "serious and unsettled" element of Cohen has not been met here. Instead it has been shown that it is "settled" that the state of the law was "clearly established" in early and mid 1981 that the sole basis for discharging a public, non-policy making employee could not be political affiliation. The court

of appeals - here properly cast the supposed "budgetary reasons" for the decision to terminate some employees as being "only a backdrop. It did not identify those employees to be terminated or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were released and would effect their actual terminations. The Elrod-Branti principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force". App.p. 20A-21A.

This recitation of the lucid application of simple constitutional rights is not repelled by any decision

or force of reason advanced by petitioners. They are reduced to charging that respondents' claims are "unsubstantial" from a "factual standpoint" on "this alone ought to be sufficient to warrant a conclusion that petitioners' appeal presents a serious and unsettled question". (Rockefeller brief p. 18). Having failed the showing of "serious and unsettled" petitioners invite a factual analysis not contemplated by either the Cohen element or the Harlow objective "good faith" qualified immunity, an issue discussed below in this brief.

As stated by petitioners, McSurely vs. McCelland, 679 F.2d 309 (D.C. Cir. 1982) found that Harlow had "jettisoned the subjective, fact oriented element of qualified immunity and vest the doctrine in terms of objective good

faith."

Actually the subjective element was simply delayed to a trial by the Harlow holding; nevertheless, McSurely held that this new objective good faith" qualified immunity was on a par with absolute immunity which has been repeatedly held immediately appealable. No discussion was had as to the elements of Cohen so an analysis of those factors is unavailable. Evans vs. Dillahunty, 711 F.2d 828 (8th Cir. 1983) is cited for added strength of another circuit to the McSurely proposition, but that opinion rejected McSurely and found "an evidentiary showing" was necessary if the facts are in dispute - a situtation clearly not applicable to the instant case. Since petitioners' brief was filed Krohn vs. United States, No. 83-1839 (August 22, 1984 - 1st Cir.) has followed the McSurely holding.

These cases simply conlude that the qualified immunity is immediately appealable in various circumstances, and base that on no holdings or rationale from this court.

II. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly estaablished right of public employees under Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.

This issue suggested by petitioners would require a finding of fact here and a disposition of this case on the merits. Such an exercise is starkly

at odds with the "objective" standard for qualified immunity set out in Harlow as well as the second element of Cohen. This element prohibits immediate appeal of an issue that is not "separate from the merits of the action". The whole point of the Harlow objective test is the avoidance of disputed questions of fact which cannot be decided in a summary judgment motion. Harlow p. 900.

Petitioner Rockefeller typifies this misunderstanding of the elementary rules of Harlow and Cohen as well as Rule 56 of the Rules of Civil Procedure in insisting that: "The test for determining petitioners' entitlement to immunity is not simply whether respondents, as public employees, had certain identifiable constitutional rights in 1981, such as the right not

to be fired based solely on politics. Rather, the test is whethr petitioners' conduct can be said to have violated or abridged any such clearly established rights of these respondents".
(petitioner Rockefeller's brief p. 21)

Both briefs pronounce the innocence of petitioners of any role in patronage dismissals on every page, invariably citing only their affidavits filed in support of their summary motions below and ignoring the remainder of the record.[7]

"Motivation" is somehow found to be an ingredient of Harlow's objective qualified immunity. (petitioner Rockefeller's brief p. 2)

Harlow anticipted the determination of the state of the law revealed to a

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[7] The terms of Rule 56 itself require

reasonable person[8] at a time when "alleged violations" occurred. See Justice Brennan's concurring opinion joined by Justice Marshall and Justice Blackmun as well as the majority writer, Justice Powell. Harlow p. 813.

In order to effectuate the objective standard of Harlow no competency factual allegations could be considered as petitioners urge. Instead the inquiry must be to state of the law applied to the facts alleged. It must be assumed that the facts would be in contest

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an analysis of "the pleadings, depositions, answers to interrogatories and admissions on file", and the court must look at this "record in the light most favorable to the party opposing the motion. See Harlow p. 900, N. 26.

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[8] Or, as here, actually known to petitioners.

during a trial but the purpose of Harlow's objective appraisal is to avoid the variable of uncertain factual setting. Pled allegations then become the factual predicate to assess the immunity issue.

The Court of appeals in the present case recognized this proposition in stating: If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithful-ness to their jobs but solely on the basis of their political affiliations the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle. App. p. 22A.

The Court of appeals in the present case recognized this proposition in stating: If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle. App. p. 22A. (emphasis supplied)

CONCLUSION

Much of petitioners' brief deals with the social costs and financial burdens to public officials in defending actions against them, and the necessity of curbing the practice.

Little has been said about the costs to the lowest order of laborers in the West Virginia Department of Highways who lost their jobs because they exercised a basic freedom. They have not benefitted by a panel of lawyers from both the public and private sector using the court system as a tactical tool to delay answering the allegations presented before a trial court and jury.

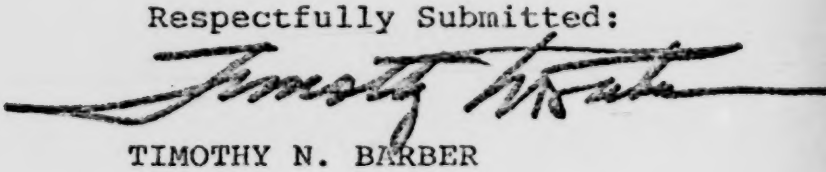
These social costs have all been incurred because petitioners wish to delay a trial. That fact was recognized by the court of appeals below (App. p.

13A-14A.

In addition to decrying the imposition of law suits on public officials, Harlow also found that damage actions against high officials are "an important means of indicating constitutional guarantees".

The respondents' rights here were clearly established and their redress should not wait for another series of hearings and appeals for the various levels of the judicary to pass on what is clearly "settled".

Respectfully Submitted:



TIMOTHY N. BARBER